(1)

Supreme Court, U.S.
FILED

No. 95 428 SEP 5 - 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX, VOLUME I, Pages 1a to 156a

JOHN M. DINGESS
DUNCAN, OSTRANDER, VARNELL & DINGESS, P.C.
7800 East Union Avenue
Suite 200
Denver, CO 80237

GREGORY L. JOHNSON
Assistant City Attorney, Utilities
30 S. Nevada, Suite 601
Colorado Springs, CO 80903

MARK T. PIFHER*
JONATHAN C. DEHMLOW
ANDERSON, GIANUNZIO, DUDE, PIFHER & LEBEL, P.C.
104 S. Cascade Avenue
Suite 204
Colorado Springs, CO 80903
(719) 632-3545

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 1PP

QUESTIONS PRESENTED

1. Does a municipality, acting in its proprietary capacity, have standing under the Fifth Amendment to the United States Constitution to bring a claim for the taking of its property without just compensation?

2. Can a local governmental entity deny a local land use permit for a federally approved project located entirely on federal Forest Service lands?

PARTIES TO THE PROCEEDING BELOW

In addition to the Board of County Commissioners of the County of Eagle, State of Colorado, the following individuals and entities were parties to the appellate proceeding below:

1. George A. Gates, Johnette Phillips, James E. Johnson, Jr., in their official capacities as individual members of said Board;

2. The Board of County Commissioners of the County of Eagle, in its capacity as the permitting authority under C.R.S. § 24-65-101, *et seq.* (1988);

3. The Eagle County Planning Commission;

4. Mark Donaldson, Robert Tether, Arlene Quenon, Robert Morris, Donald Price, in their official capacities as individual members of the Planning Commission;

5. The County of Eagle, State of Colorado;

6. Holy Cross Wilderness Defense Fund;

7. Vail Valley Consolidated Water District.

At the time of the filing of the litigation in the Eagle County District Court, the following individuals and entities were also named defendants:

1. Donald H. Welch and Richard L. Gustafson, in their official capacities as individual members of the Eagle County Board of County Commissioners;

2. Charles Ridgway, David Slemon, and Dennis Gelvin, in their official capacities as individual members of the Eagle County Planning Commission;

PARTIES TO THE PROCEEDING BELOW – Continued

In addition, the following entities, which did not actively participate in the litigation but were parties to the county permit proceeding, were named defendants in the District Court litigation: Avon Metropolitan District; Town of Avon, Colorado; Colorado Council of Trout Unlimited; Colorado River Outfitters Association; Division of Wildlife, State of Colorado; Eagle County Sheriff, in his official capacity; James Franklin Lamont; Red Cliff Water and Sanitation District; Town of Eagle, Colorado; Town of Gypsum, Colorado; Town of Minturn, Colorado; Town of Red Cliff, Colorado; Town of Vail, Colorado; Upper Eagle Regional Water Authority; Upper Eagle Valley Sanitation District; Vail Associates, Inc.; Eagle County Historical Society.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 3

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED..... 3

STATEMENT OF THE CASE 4

Introduction 4

The Federal Permitting Process 5

Decision of the Eagle County Board of County Commissioners 7

The Colorado District Court Decisions 8

The Colorado Court of Appeals Decision 9

The Colorado Supreme Court Decision 10

REASONS FOR ISSUING THE WRIT 10

I. THE SUPREME COURT MUST RESOLVE CONFLICTS AMONGST THE LOWER COURTS..... 10

A. Standing to Sue 10

B. Federal Preemption 14

II. THE COLORADO COURT OF APPEALS' DECISION ESTABLISHES BAD PUBLIC POLICY.... 15

III. THE COLORADO COURT OF APPEALS DECISION WAS IN ERROR 18

A. Standing to Sue 18

B. Federal Preemption 22

1. Conflict with Federal Laws 23

TABLE OF CONTENTS – Continued

Page

2. Conflict with Congressional Wilderness Exemption..... 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Amato v. Wilentz, 952 F.2d 742 (3rd Cir. 1991) 12

Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970) 20

Board of Comm'rs v. City of Fort Collins, 68 Colo. 364, 189 P. 929 (1920) 13

Board of Education v. Allen, 392 U.S. 236 (1968) 20

Board of Levee Comm'rs v. Huls, 852 F.2d 140 (5th Cir. 1988) 11

Brendale v. Confederated Tribes, 492 U.S. 408 (1989) 28

Brubaker v. Board of County Comm'rs, 652 P.2d 1050 (Colo. 1982) 9, 14, 26

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) 9, 15, 17, 22, 23, 25, 26, 27

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 23

Castlewood Corp. v. Denver, 41 Colo. App. 565, 594 P.2d 1062 (1978) 22

Citizens for a Better Henderson v. Hodel, 768 F.2d 1051 (9th Cir. 1985) 26

City and County of Denver v. Bergland, 695 F.2d 465 (10th Cir. 1982) 25, 26

City and County of Denver v. Colorado River Water Conservation Dist., 696 P.2d 730 (Colo. 1985) ... 21, 22

City and County of Denver v. Board of County Comm'rs, 782 P.2d 753 (Colo. 1989) 7

TABLE OF AUTHORITIES – Continued

Page

City of Charleston v. Public Serv. Comm'n of W.VA, 57 F.3d 385 (4th Cir. 1995) 11, 12

City of Chester v. Commonwealth Dept. of Transp., 434 A.2d 695 (Pa. 1981) 10

City of New Orleans v. New Orleans Waterworks Co., 142 U.S. 79 (1891) 18, 19, 22

City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231 (9th Cir. 1980) 11, 20

City of Thornton v. Farmers Reservoir and Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978) 21

City of Trenton v. New Jersey, 262 U.S. 182 (1923) 11, 19, 21

City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539 (1905) 19, 22

Coleman v. Miller, 307 U.S. 433 (1939) 9, 18

Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981) 9, 25, 26

Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) 22

Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955) 27

Fidelity Federal Savings and Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 22

First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946) 27

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 20

Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515 (10th Cir. 1992) 6, 7

TABLE OF AUTHORITIES – Continued

Page

Hunter v. City of Pittsburgh, 207 U.S. 161 (1907)...19, 21

Idaho ex rel Andrus v. Click, 97 Id. 791, 554 P.2d 969 (1976)..... 14

In re Application for Water Rights, 799 P.2d 33 (Colo. 1990)..... 7

Kleppe v. New Mexico, 426 U.S. 529 (1976)..... 22

Mesa Verde Co. v. Montezuma County, 831 P.2d 482 (Colo. 1992)..... 21

Montana v. Johnson, 738 F.2d 1074 (9th Cir. 1984)..... 26

Navajo Development Co. v. Sanderson, 655 P.2d 1374 (Colo. 1982)..... 4

New Castle County School Dist. v. State, 424 A.2d 15 (Del. 1980).....12, 13, 18

Ogden Environmental Services v. City of San Diego, 687 F. Supp. 1436 (S.D. Cal. 1988)..... 14

Public Serv. Co. of Colorado v. FERC, 754 F.2d 1555 (10th Cir. 1985)..... 21

Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P.2d 171 (1946)..... 28

Rogers v. Brockette, 588 F.2d 1057 (5th Cir. 1979).....11, 19, 20

School Dist. of Philadelphia v. Pennsylvania Milk Marketing Bd., 877 F. Supp. 245 (E.D. Pa. 1995)..... 12

Town of Orchard City v. Board of Delta County Comm'rs, 751 P.2d 1003 (Colo. 1988).....9, 18

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819)..... 19

TABLE OF AUTHORITIES – Continued

Page

United States v. 50 Acres of Land, 469 U.S. 24 (1984) 10

United States v. New Mexico, 438 U.S. 696 (1978) 15, 16, 23, 24

Utah Power and Light Co. v. United States, 243 U.S. 389 (1917) 22

Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979) 9, 14, 15, 27

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 28

Wiebert v. Rothe Bros., 618 P.2d 1367 (Colo. 1980) 21

STATUTES:

16 U.S.C. § 475 ..... 3, 16, 23

16 U.S.C. § 481 ..... 3, 24

16 U.S.C. § 528 ..... 3, 25

16 U.S.C. § 530 ..... 3, 25

16 U.S.C. § 1600 ..... 3, 24

16 U.S.C. § 1604 ..... 3, 24

16 U.S.C. § 1604(a) 3, 25

16 U.S.C. § 1612(a) 3, 25

28 U.S.C. § 1257 3

33 U.S.C. § 1344 6

43 U.S.C. § 1701 ..... 3, 24

43 U.S.C. § 1712(c) 3, 25

43 U.S.C. § 1712(c)(9) 3, 25

43 U.S.C. § 1732 ..... 3, 24

TABLE OF AUTHORITIES – Continued

Page

43 U.S.C. § 1761(a)(1) 3, 25

43 U.S.C. § 1765(a) 3, 25

Act of December 22, 1980, P.L. 96-560, § 102(a)(5), 94 Stat. 3265 ..... 3, 5, 29

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. IV, § 3, cl. 2 (Property Clause) 3, 22

Colo. Const. art. XX, § 1 21

Colo. Const. art. XX, § 6 21

REGULATIONS:

36 C.F.R. § 219.6 ..... 4, 25

36 C.F.R. § 219.7 ..... 4, 25

36 C.F.R. § 219.8 ..... 4, 25

36 C.F.R. § 219.10 ..... 4, 25

OTHER AUTHORITIES:

26 Am. Jur.2d § 179, *Eminent Domain*, (1966) 13

A.S.Klein, Annotation, *Condemnation of Public Entities' Land*, 35 A.L.R.3d 1293 (1971) 19

Case Comment, *Municipal Corporation Standing to Sue the State: Rogers v. Brockette*, 93 Harv. L. Rev. 586 (1980) 20

1 Julius L. Sackman, Nichols' The Law of Eminent Domain, § 2.225[1] (rev. 3d ed. 1993) 13, 18

No. _____

In The

Supreme Court of the United States

October Term, 1995

CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

The cities of Aurora, Colorado and Colorado Springs, Colorado petition for a writ of certiorari to review the judgment of the Colorado Court of Appeals entered in this case on November 17, 1994. The Court of Appeals held that a county could unilaterally deny petitioners a permit under the Colorado Land Use Act for a federally approved project located entirely on federal lands. In addition, the court found that petitioners did not have standing under the Fifth or Fourteenth Amendments to the United States Constitution to assert a regulatory takings claim. On June 5, 1995, the Colorado Supreme Court denied the cities' petition for writ of certiorari.

OPINIONS BELOW

1. The decision of the Colorado Court of Appeals reported at 895 P.2d 1105 (1994). App. 1a-33a.

2. Relevant portions of the FLPMA permit issued for the Homestake Water Project ("Project") by the United States Forest Service. App. 34a-107a.

3. Relevant portions of the Section 404 permit issued for the Project by the U.S. Army Corps of Engineers. App. 108a-134a.

4. The decision of the Colorado Water Quality Control Division certifying that the Project met all applicable state water quality requirements. App. 135a-141a.

5. The resolutions of the Eagle County Board of County Commissioners ("County") denying the local land use permits for the Project. App. 142a-161a.

6. The orders of the Eagle County District Court dismissing for lack of standing the claims of the cities brought under the Fifth and Fourteenth Amendments to the United States Constitution. App. 162a-172a.

7. The initial decision of the Eagle County District Court remanding the case to the Board of County Commissioners. App. 173a-191a.

8. The decision of the Eagle County District Court finding that the County had denied the cities' due process and acted in an arbitrary and capricious manner in denying the requested permits. App. 192a-206a.

9. The order of the Eagle County District Court vacating that portion of its prior decision which had required the County to issue the permits. App. 207a-212a.

10. The Colorado Court of Appeals decision denying the cities Petition for Rehearing. App. 213a.

11. The Colorado Supreme Court decision denying the cities' Petition for Writ of Certiorari. App. 214a-216a.

12. Relevant portions of the pleadings and briefs below indicating the manner in which the federal questions were raised. App. 217a-269a.

JURISDICTIONAL STATEMENT

The decision of the Colorado Court of Appeals was entered on November 17, 1994. The order of the Colorado Supreme Court denying the petition for writ of certiorari was entered on June 5, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Relevant provisions of the Colorado Land Use Act, C.R.S. §§ 24-65.1-101-502 (1988) are attached as App. 270a-279a.

2. Relevant provisions of the Eagle County land use regulations promulgated pursuant to C.R.S. § 24-65.1-101-502 (1988) are attached as App. 280a-295a.

3. Relevant provisions of the Federal Land Policy Management Act, 43 U.S.C. § 1700-1784 (1986), are attached as App. 296a-300a.

4. Relevant provisions of the National Forest Management Act, 16 U.S.C. §§ 472a, 476 note, 500, 513, 515, 516, 518, 521b, 528 note, 576b, 581h, 594-2 note, 1600 note, 1600-1614 (1985), are attached as App. 301a-303a.

5. Relevant provisions of the Organic Act of 1897, 16 U.S.C. §§ 475-481 (1985), are attached as App. 304a-305a.

6. Relevant provisions of the Multiple Use and Sustained Yield Act, 16 U.S.C. §§ 528-531 (1985), are attached as App. 306a-307a.

7. The text of the Property Clause of the United States Constitution, art. IV, § 3, cl. 2, is set forth at App. 308a.

8. The text of the Fifth and Fourteenth Amendments to the United States Constitution are attached as App. 309a-311a.

9. The text of the Supremacy Clause of the United States Constitution, art. VI, cl. 2, is set forth at App. 312a.

10. Relevant portions of P.L. 96-560, 94 Stat. 3266 (1980) are attached as App. 313a.

11. Relevant portions of the Code of Federal Regulations, 1983 edition, governing the use of federal lands, 36 C.F.R. Part 200 through 299, are set forth at App. 314a-318a.

STATEMENT OF THE CASE

Introduction

This case arises from the denial of land use permits by Eagle County, Colorado for Phase II of the Homestake Water Project ("Project"). The Project is to be constructed for the benefit of the cities of Aurora, Colorado and Colorado Springs, Colorado and is located entirely on federal lands within the White River National Forest. The County denial came after the cities had successfully secured a land use permit and a dredge and fill permit for the Project from the U.S. Forest Service and the U.S. Army Corps of Engineers, respectively.

The Project, a significant part of the cities' water supply infrastructure for many decades, would bring additional water from the western side of the Continental Divide in Colorado to the East Slope cities. The cities purchased their interest in the water to be diverted, stored and conveyed through Project facilities in 1955. The water rights for both Phase I and Phase II of the Project were decreed to the cities by the water court in 1962.[1] Phase I, which consists of a series of surface diversion points, pipelines, a reservoir and tunnel, was completed in 1967. The storage and delivery features were sized so as to accommodate the anticipated additional flows from Phase II of the Project, which will bring water into the system from other streams in the basin. See attached map, App. 319a.

In 1980, thirteen (13) years after the completion of Phase I, the lands in question were designated by Congress as part of the Holy Cross Wilderness. However, at the time of designation, Congress granted the cities a statutory exemption

---

[1] Under Colorado's appropriation doctrine, water rights are a usufructuary property interest that may be severed from the land. See *Navajo Development Co. v. Sanderson*, 655 P.2d 1374, 1377 (Colo. 1982).

covering their previously existing rights. P.L. 96-560, § 102(a)(5), 94 Stat. 3265 (1980). App. 313a.[2] As noted by the Forest Service in the Environmental Impact Statement for Phase II, the Project was to be treated for permitting purposes as if it were in a portion of National Forest allocated to non-wilderness use.

The Federal Permitting Process

In 1981, the cities made application under the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. § 1700, *et seq.*, to the United States Forest Service for a land use permit authorizing the development of Phase II. This action triggered the preparation of an environmental impact statement to be prepared under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.* The NEPA process ultimately entailed 19 public meetings, including a Congressional oversight hearing. The NEPA analysis included the consideration of various project alternatives and concluded that the cities' proposed alternative was not only environmentally acceptable, but preferable. App. 56a-60a, 122a. Eagle County actively participated in the federal permitting process. In 1983, the Forest Service conditionally approved the FLMPA permit. The permit contained numerous conditions addressing environmental concerns, including but not limited to, wetland preservation and water quality maintenance. It stated that "[t]his decision includes all practicable means to avoid or minimize environmental harm." App. 36a-41a, 50a, 72a-107a.[3]

---

[2] The cities agreed to construct a more expensive but less environmentally intrusive tunnel system under the wilderness from outside its perimeter rather than utilizing the original "surface canal" configuration.

[3] The Forest Service Record of Decision contained 29 conditions and mitigation requirements, focusing upon water quality, air quality, aesthetics, fish and wildlife. App. 72a-107a. It required "environmental maintenance in-stream flow bypasses" at each of the diversion sites. App. 39a, 82a-84a. With specific reference to wetlands, having considered the varying expert opinions, and having conducted detailed studies with assistance

The cities were further required to secure a Section 404 permit for dredge and fill activities from the U.S. Army Corps of Engineers. See 33 U.S.C. § 1344 (1986); App. 108a-134a. The Corps permit, issued in 1984, similarly incorporated an array of special conditions and mitigation requirements, including an outright *prohibition* against wetland loss.

> It is the intent of the District Engineer that the wetlands in the Holy Cross Wilderness Area be preserved. Therefore the applicants shall prevent the loss of wetlands in the Fall and Cross Creek Drainages due to water diversions from the Homestake Phase II Project. . . . App. 113a-114a.[4]

The permit further mandated the development of "a plan for preventing or mitigating impacts to the wetlands in the Holy Cross Wilderness Area," a draft of which was submitted to Eagle County. The plan identified operational flow releases as the mitigation option of first choice for wetlands preservation.[5] Both the Forest Service and Corps permits have withstood court challenge by opponents of the Project.[6]

---

from the United States Fish and Wildlife Service, the Colorado Department of Wildlife, and the Corps of Engineers, the Forest Service found that "significant adverse effects will not occur and this action minimizes the loss of wetlands." App. 52a.

[4] The federal permitting process was the subject of an extensive administrative review proceeding. See *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1519, n.5 (10th Cir. 1992).

[5] "Operational flow releases" require appropriators to forego certain water diversions in order to pass additional water through downstream wetland areas.

[6] Claims brought under the Clean Water Act and the National Environmental Policy Act were dismissed by the District Court of Colorado and the Tenth Circuit Court of Appeals. The Tenth Circuit noted that "the Corps' permitting review process culminated in a permit requiring a comprehensive mitigation plan to *prevent* wetlands' losses," and emphasized that the Corps, by making its decision "to issue its permit with the specific condition that there be no wetland losses," in fact "*assumed* such impacts and essentially guaranteed that the cities mitigate those impacts."

Finally, the cities successfully obtained a Section 401 certification from the Colorado Water Quality Control Division stating that the Project would meet all applicable state water quality requirements.

In reliance upon the property interests they had obtained, the cities have spent approximately 78 million dollars to date in the construction of Phase I, obtaining and protecting their rights in court proceedings, and pursuing the permitting of Phase II.

Decision of the Eagle County Board of County Commissioners

Having obtained all necessary state and federal approvals, the cities sought a permit from Eagle County under the Colorado Land Use Act, C.R.S. § 24-65.1-101, *et seq.*[7] Eleven days of public hearings on the permit request were held in Vail, Colorado before the County Planning Commission and Board of County Commissioners. The Planning Commission recommended approval of the application subject to compliance with 53 conditions. However, the Board of County Commissioners unanimously voted to deny the permits. The denial was based upon certain findings, including:

(Emphasis in original). 960 F.2d at 1526-27. See also *In re Application for Water Rights*, 799 P.2d 33, 36 (Colo. 1990) (Colorado Supreme Court upheld decree for change of water rights to conform the location of the cities diversion points to the project description given Congress, while highlighting the fact that the water court had found that the requested alternate points of diversion would not result in material injury to plant or animal life or to visual and aesthetic values of the wilderness, especially in light of state held in-stream flow water rights and Forest Service permit bypass requirements).

[7] The Colorado Supreme Court has described the Act as "Colorado's first comprehensive land use law, . . . designed to protect Colorado's land resources and allocate those resources among competing uses." *City and County of Denver v. Board of County Comm'rs*, 782 P.2d 753, 755 (Colo. 1989).

3. The evidence presented at the hearing *failed to demonstrate that the significant deterioration of the wetlands can be adequately mitigated.*

4. There will be a significant deterioration in public outdoor recreational areas because of *loss in the quality and quantity of the river rafting experience and construction disturbances in the wilderness area.*

6. *Reduction in stream flows and construction* activities *in the wilderness area* will result in a significant *degradation of natural scenic characteristics.* (emphasis added)

App. 147a.[8]

The Colorado District Court Decisions

The cities appealed the permit denial to the Eagle County District Court. By two separate orders, App. 162a-172a, the District Court dismissed the cities' original "takings" claim upon determining that the cities, as municipal corporations, are not citizens under the Fifth and Fourteenth Amendments to the United States Constitution, and therefore lacked standing.

The District Court subsequently issued an order upon cross motions for summary judgment, concluding that many of the County's original findings were preempted under state and federal laws. App. 173a-191a. However, the Court further found that the County had jurisdiction over "wetlands, aquatic habitats, and possibly the nuisance factors," and remanded the case for further consideration.[9] App. 187a. In response to the County's decision upon remand, the District Court issued an order finding that the County had deprived the cities of due

---

[8] The County, upon remand from the Eagle County District Court, adopted Resolution 91-104, App. 157a-161a, which merely reaffirmed certain of its original findings.

[9] The District Court did indicate in its order that the preemption doctrine has been held to preclude zoning officials from denying a special use permit for activities on federal lands. App. 186a.

process and acted in an arbitrary and capricious fashion given that its decision was unsupported by any competent evidence. App. 192a-206a.[10] The County decision was vacated and the County was ordered to issue the requested permits.[11]

The Colorado Court of Appeals Decision

The County appealed the District Court decision. The Colorado Court of Appeals reversed, finding "ample evidence to support the Board's determination that the criteria in the two areas which the trial court found were not preempted – wetlands protection and nuisance factors – had not been satisfied." App. 7a. The Court implicitly rejected the cities' argument that the County "denial" decision was, in fact, preempted by federal law.[12]

The Court of Appeals, relying upon *Town of Orchard City v. Board of Delta County Comm'rs*, 751 P.2d 1003 (Colo. 1988) and *Coleman v. Miller*, 307 U.S. 433 (1939), upheld the lower court determination that the cities lack standing to bring a claim for compensation under the Fifth Amendment to the United States Constitution. App. 29a.

The cities filed a Petition for Rehearing with the Court of Appeals, asserting that the Court's conclusions upon federal

---

[10] The Court also stated in its July 14, 1992 order that the holdings in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) and *Columbia Basin Land Protectio : Ass'n v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981) supported the cities' contention that the county could not deny a permit for a federally approved project located on federal land. App. 201a.

[11] Upon reconsideration, the District Court vacated that portion of its prior decision which had required the county to issue the permits, and remanded the permitting decision to the County with direction to take official notice of the mitigation requirements imposed by the federal agencies. App. 207a-212a.

[12] The Court reached this conclusion despite the cities' citation to the decisions in *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050 (Colo. 1982), *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), and *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987). App. 244a-256a.

preemption and standing were clearly erroneous. App. 262a-265a. The cities' Petition was summarily denied. App. 213a.

The Colorado Supreme Court Decision

The cities filed a petition for writ of certiorari with the Colorado Supreme Court, identifying as issues whether the Court of Appeals erred in allowing the County to veto a federally approved project located entirely on federal lands and in finding that the cities lacked standing under the Fifth Amendment. On a 5-2 vote, the Supreme Court denied certiorari. App. 214a-216a.

REASONS FOR ISSUING THE WRIT

I. THE SUPREME COURT MUST RESOLVE CONFLICTS AMONGST THE LOWER COURTS

A. Standing to Sue

A genuine conflict currently exists on an issue squarely presented in this case: whether one subdivision of a state may assert a Fifth Amendment takings claim against another subdivision. The conflict involves the Delaware and Pennsylvania Supreme Courts, as well as the Fourth, Fifth and Ninth Circuits.

The Pennsylvania Supreme Court and the Ninth Circuit have adopted a per se rule that one state entity may not assert a takings claim against another. In *City of Chester v. Commonwealth Dept. of Transp.*, 434 A.2d 695 (Pa. 1981), the Pennsylvania State Department of Transportation condemned a municipal park. The city sued for just compensation. The Pennsylvania Supreme Court allowed the claim under the state constitution. 434 A.2d at 702. The Court ruled, however, that the Fifth Amendment does not allow a school district to claim a taking, as the Amendment concerns only "private property." 434 A.2d at 701. Cf: *United States v. 50 Acres of Land*, 469 U.S. 24, 25-26 (1984) (the reference to "private property" in the takings clause of the Fifth Amendment can encompass the property of state or local governments).

In *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980), *cert. denied*, 449 U.S. 1039 (1980), a California state agency adopted plans and regulations limiting residential development in a city. The city sued, alleging that the plan would take property without just compensation in violation of the Fifth Amendment. *See* 625 F.2d at 232. The Ninth Circuit held that the city lacked "standing" to challenge the plans and regulations on constitutional grounds. 625 F.2d at 233.

On a similar note, in *Board of Levee Comm'rs v. Huls*, 852 F.2d 140 (5th Cir. 1988), the Louisiana legislature passed an act requiring the Orleans Levee District to convey some land that it owned. The Levee Board sued the state, arguing that the statute constituted an uncompensated taking. Relying upon *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), the Fifth Circuit concluded that under the facts before it the "Board cannot sue the state for an uncompensated taking of property." 852 F.2d at 142.[13]

In *City of Charleston v. Public Serv. Comm'n of W.VA*, 57 F.3d 385 (4th Cir. 1995), on the other hand, the Fourth Circuit recently had occasion to re-examine the question of whether a political subdivision may sue its maker on constitutional grounds. After noting the existence of a conflict on the issue, the Court assumed that such suits are indeed allowed.

> Moreover, doubts have been expressed as to whether the "broad dicta" that "a political subdivision may never sue its maker on constitutional grounds" is really "the rule." See *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1309 (9th

---

[13] The Court, nevertheless, failed to overrule its prior decision in *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979), *cert. den.*, 444 U.S. 827 (1979), stating that the *Rogers* decision "dealt only with the theoretical possibility that a city has standing to sue its state." 852 F.2d at 143. However, the *Rogers* court had specifically noted that the *Trenton* line of cases simply "hold that the Constitution does not interfere in the internal political organization of states" and, in fact, *Trenton* "implicitly [acknowledges] that a municipality could raise the claim that its private contract and property rights have been impaired." 588 F.2d at 1069-1070.

> Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982); see also *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1042, 101 S.Ct. 619, 621, 66 L.Ed.2d 502 (1980) (White & Marshall, JJ., dissenting from denial of certiorari) ("Such a per se rule is inconsistent with [*Board of Educ. v.*] *Allen*, [392 U.S. 236, 88 S.Ct. 192, 20 L.Ed.2d 1060 (1968)]"); *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45, 81 S.Ct. 125, 129, 5 L.Ed.2d 110 (1960); *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500, 504-06 (6th Cir. 1986); *Rogers v. Brockette*, 588 F.2d 1057, 1067-71 (5th Cir.), *cert. denied*, 444 U.S. 827, 100 S.Ct. 52, 62 L.Ed.2d 35 (1979).
>
> Thus, whether the cities have standing to bring this suit is unclear. . . . Accordingly, we assume – without deciding – that the cities have standing to assert the Contract Clause claim made here and address the merits of that claim.[14]

Id. at 389-90.

In *New Castle County School Dist. v. State*, 424 A.2d 15 (Del. 1980), the Delaware Supreme Court also rejected any exclusionary rule on standing. The Delaware legislature had passed a law requiring a particular school district to convey land to a state agency for use as a park. The school district challenged the state law as a taking. The Delaware Supreme Court directly contradicted the Pennsylvania Supreme Court and the Fifth and Ninth Circuits. It held that, under the Fifth Amendment, the rule "regarding compensation to municipal

---

[14] See also *School Dist. of Philadelphia v. Pennsylvania Milk Marketing Bd.*, 877 F. Supp. 245, 250 (E.D. Pa. 1995) ("In recent years, however, a split has developed among the circuits on this [standing] issue."); *Amato v. Wilentz*, 952 F.2d 742, 754-755 (3rd Cir. 1991) (judicial support for a per se rule excluding municipal standing may be "waning with time").

corporate entities" is that "property which is held in a proprietary capacity cannot be taken by the State unless just compensation is paid." 424 A.2d at 16-17.

The Delaware Court relied on the leading treatise in the field which, citing many cases from a variety of jurisdictions, states: "The property acquired by municipal corporations for the private benefit of their inhabitants is protected by the constitution, and can be taken only by eminent domain, and *upon payment of its value*." 1 Julius L. Sackman, Nichols' The Law of Eminent Domain, § 2.225[1], at 2-158 (rev. 3d ed. 1993).

The Delaware Court also relied on a section of a prominent legal encyclopedia, which provides:

> The common constitutional provision against taking of private property without payment of compensation is generally held to be applicable to the taking by the state or a subdivision or agency thereof of the property held by another subdivision or agency in its proprietary capacity.

26 Am. Jur. 2d § 179, at 858. *Eminent Domain*, (1966).

The Cities of Aurora and Colorado Springs, like other cities, hold their water rights as proprietary property. *See* 26 Am. Jur. 2d § 179, at 858. *Eminent Domain*, (1966) (proprietary property includes "the property which the inhabitants of a city or town have acquired for the purposes of supplying them with the necessities of life, such as water, gas or electric light."); *Board of County Comm'rs v. City of Fort Collins*, 68 Colo. 364, 367, 189 P. 929, 930 (1920) (in operating a waterworks system a city acts in its proprietary or business capacity and not in its political or governmental capacity).

As a result, if this case had arisen in Delaware or the Fourth Circuit, the Cities of Aurora and Colorado Springs could have raised their Fifth Amendment takings claims. Yet, because the case arose in Colorado, they could not. These circumstances warrant review by this Court.

B. Federal Preemption

By implicitly assuming that federal law did not preempt the county's denial decision, the Colorado Court of Appeals' opinion clashes with decisions by the Ninth Circuit and this Court. The Ninth Circuit was faced with a similar set of circumstances in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), aff'd mem., 445 U.S. 947 (1980). In that case, the County insisted that Gulf obtain a land use permit if it wished to continue its mineral exploration activities on federal lands within the county. In finding that the governing federal legislation preempted the exercise of such county veto authority, the Ninth Circuit observed:

> Despite this extensive federal scheme reflecting concern for the local environment as well as development of the nation's resources, Ventura demands a right of final approval. Ventura seeks to prohibit further activity by Gulf until it secures an Open Space Use Permit which may be issued on whatever conditions Ventura determines appropriate, or which may never be issued at all. The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.

Id. at 1084. The Court then continued: "[T]he states and their subdivisions have no right to apply local regulations impermissibly conflicting with achievement of a Congressionally approved use of federal lands. . . . " *Id.* at 1086. See also *Idaho ex rel. Andrus v. Click*, 97 Id. 791, 554 P.2d 969 (1976); *Ogden Environmental Services v. City of San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988).[15]

---

[15] The *Ventura County* decision is, in turn, consistent with the Colorado Supreme Court's opinion in *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050 (Colo. 1982), wherein the Court held that a county special use permit denial was preempted by federal law, as it stood as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 1055. Simply stated, the Court determined that "such a veto power is not consistent with the Supremacy Clause." *Id.* at 1056.

The Colorado Court of Appeals' decision is likewise at odds with the direction taken by this Court in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987). Although this Court found therein that reasonable state "environmental" regulations covering Forest Service land were not per se preempted by federal law, the 5-4 majority described this holding as a "narrow" rejection of a "purely facial challenge." *Id.* at 580, 593. Granite Rock had not even applied for a state permit, arguing that there was no possible set of conditions that the state could place on its permit which would not conflict with federal law. It therefore had "lost the possibility of making this argument [prohibition] in this litigation." *Id.* at 588.[16] In the present case, not only has that prohibition of a federally permitted project located on federal lands occurred, but the County made no attempt whatsoever to impose conditions, reasonable or otherwise.[17]

Thus, this Court is being called upon to clarify an issue of critical importance to both federal land managers and proponents of project development, i.e., the authority of a local governmental entity to "deny," based on the same impacts reviewed in the federal process, a local permit for a federally approved activity located on federal lands.

II. THE COLORADO COURT OF APPEALS DECISION ESTABLISHES BAD PUBLIC POLICY

Approximately forty-six (46) percent of the West is federally owned lands, much of it managed by the Forest Service or Bureau of Land Management. *United States v. New Mexico*,

---

[16] Significantly, the majority decision assumed without deciding, an assumption deemed "correct" in the dissent and consistent with the decision in *Ventura County*, *supra*, that "the combination of the NFMA and the FLPMA preempt the extension of state land use plans . . . in national forest lands." 480 U.S. at 585, 612.

[17] As further explained below, the County findings, with specific reference to their reliance on the "wilderness" designation, nuisances, aesthetics, and in-stream flow needs, were more nearly akin to preempted "land use" controls than to environmental regulations.

438 U.S. 696, 699, n.3 (1978). Congress set aside such lands for specific purposes including, in the case of national forest lands, the securing of favorable water supplies and timber production. 16 U.S.C. § 475 (1985).

Utility projects, be they water, electric or gas, oftentimes cross federal lands, especially in the more arid and sparsely populated Western portions of this country, where water and power are transported across great expanses. Existing projects on federal lands will need to be maintained, repaired and replaced in the future, while new projects, especially those designed to bring essential services to growing Western cities, will have to be constructed. At the time of federal permitting for such projects, alternatives will be examined, public hearings will be held, and necessary mitigation conditions will be imposed. Allowing the lower court decision to stand will negatively impact upon these important activities and frustrate the Congressional purposes underlying national forest legislation.

First, the decision below allows, and indeed encourages, "local" branches of government to sit quietly on their hands during federal review proceedings, only to play their "trump card" at the end of the process. Second, the decision permits local entities to "second guess" federal determinations upon impacts and mitigation requirements over the federal government's land – just as occurred in this instance.[18] Third, it exposes permittees to duplicitous and potentially conflicting requirements. Each separate jurisdiction which the pipeline, power line, canal or other project crosses could apply its own unique mandates, without regard for either the federal conditions or the requirements imposed by neighboring governmental bodies. Fourth, the decision exposes permittees to the

---

[18] For example, the Corps found that there would be no unacceptable harm to wetlands as a result of this project, but in an abundance of caution mandated the completion of a complex monitoring and mitigation plan, inserted a "no loss" condition in the § 404 permit, and required a bypass of project diversions should unanticipated wetland damage occur. The county then vetoed the project based on wetland mitigation concerns.

prospect of "unreasonable" conditions which amount, in and of themselves, to a prohibition.[19]

Finally, a failure to reverse the Court of Appeals decision would allow local entities to foreclose, by use of their "denial" authority, certain federally approved uses on federal lands, thereby not only usurping federal authority, but harming the federal programs governing resource use which were developed to fulfill Congressional directives. This result, openly antagonistic to federal land management interests, could be accomplished under the guise of "environmental regulation," when in fact the governmental body is implementing a local land use scheme. It is the very result feared by the dissenting opinion in *Granite Rock*, i.e., "duplicative" processes wherein a local regulator has given itself final authority to determine how federal lands are to be used. *Granite Rock*, 480 U.S. at 605.

The lower court's decision on municipal standing would likewise have far-reaching impacts, potentially touching every municipality across the country.[20] Though municipalities oftentimes purchase water rights, real property, or other tangible goods in the free market, and pay market price therefor, under the decision below they would have no recourse to seek just compensation if those assets were subsequently taken by the state or an agency of the state. This would be true whether or not the municipality was constitutionally created, and thus not subject to dissolution by the state, and whether or not it was acting in its proprietary capacity in the provision of an essential utility service.[21]

---

[19] To the extent the county would argue that the federal mitigation plan was inadequate, despite its operational flow release option, there is no reasonable environmental regulation available for this otherwise federally permitted Project. That is to say, there exists a de facto prohibition, the very exception to allowable "environmental" regulation noted in the *Granite Rock* decision, 480 U.S. at 587.

[20] The decision would also adversely affect quasi-governmental entities to the extent they are deemed "creatures of the state."

[21] In addition, where the regulating entity need not be concerned about having to pay another governmental body for a complete or partial,

Finally, as also evidenced by this case, without a determination that municipalities have such standing, there could be a "regulatory redistribution," by local agencies, of essential natural resources, including water. If, for example, a county can deny a permit because the county wants additional flows in the stream for wetlands inundation, aesthetics, and rafting, yet it does not have to acquire those flows in a water court adjudication, purchase them in the marketplace, or pay the permittee for its senior decreed rights, the county has, in effect, reallocated the resource without any cost to its local citizens. This is not the type of "planning" which leads to a considered and orderly distribution of essential commodities – particularly those regulated by federal agencies in furtherance of Congressional purposes, goals and mandates.

III. THE COLORADO COURT OF APPEALS' DECISION WAS IN ERROR

A. Standing to Sue

Relying upon dicta in *Town of Orchard City v. Board of Delta County Comm'rs*, 751 P.2d 1003, 1006 (Colo. 1988), and this Court's opinion in *Coleman v. Miller*, 307 U.S. 433 (1939), the Court below found that the mere identity of the cities stood as an absolute bar to standing under the Fifth and Fourteenth Amendments to the United States Constitution. App. 29a.

As previously noted, the above conclusion is directly contrary to the black letter law upon this subject, as well as the decision of the Delaware Supreme Court in *New Castle County School District v. State*, 424 A.2d 15 (Del. 1980). See 1 Julius L. Sackman, Nichols on Eminent Domain § 2.225[1] at 2-158 (3d Ed. 1993). In support of the determination that standing does exist in such cases, Nichols cites numerous court opinions, including such early decisions of this Court as *City of New Orleans v. New Orleans Waterworks Co.*, 142

---

temporary or permanent deprivation of the reasonable use of its property, that entity lacks any incentive to reach a mutually satisfactory resolution where competing local interests are at stake.

U.S. 79 (1891) and *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539 (1905), in which a proprietary/governmental distinction was explicitly recognized. The same conclusion is reached at A.S. Klein, Annotation, *Condemnation of Public Entities' Land*, 35 A.L.R.3d 1293 at 1307 (1971):

> The common constitutional provision against the taking of private property without payment of compensation is generally held to be applicable to the taking by the State or subdivision or agency thereof of the property held by another subdivision or agency in its proprietary capacity.

Cases finding an absence of standing in such situations are the descendants of *Trustees of Dartmouth College v. Woodward*, 17 US. (4 Wheat.) 518 (1819), wherein New Hampshire was prohibited under the Contract Clause to the U.S. Constitution from modifying a charter that the colonial government had issued to the College. In the famous dicta to that decision, Chief Justice Marshall sought to avoid a situation wherein citizens of the state could claim they had a "contract" with the state, because such an interpretation would bar the state from impairing any such contract. This would leave a state practically unable to legislate or allocate political power within its subdivisions. Justice Marshall's solution was to enunciate the principle that certain guarantees of the U.S. Constitution should not be interpreted to interfere with a state's control over the allocation of its political powers.

Typical of the series of cases following *Dartmouth* is *City of Trenton v. New Jersey*, 262 U.S. 182 (1923). In *City of Trenton*, the state modified a charter that it had previously given to the municipality. In holding that the municipality had no standing to challenge the change, the Court quoted extensively from *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-9 (1907), which is considered the leading example of such standing limitations. *Rogers*, 588 F.2d at 1067, 1068.[22]

---

[22] The Cities submit that the Supreme Court implicitly acknowledged in *Hunter*, 207 U.S. at 179-80, that a municipality can raise a claim that its "private" contract and property rights have been impaired.

However, when these cases were decided, "standing" meant something different from what it means today. See *Rogers*, 588 F.2d at 1057. The old legal standing test went to the merits of the case. *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970). By resolving these substantive issues under the rubric of standing principles, these decisions have been misinterpreted as a broad denial of access to the courts. As a result, substantive issues have become distorted and parties' claims have been deprived of the full consideration they deserve. Case Comment, *Municipal Corporation Standing To Sue The State: Rogers v. Brockette*, 93 Harv. L. Rev. 586 at 590, 591 (1980).

This Court subsequently discussed its prior rulings on this topic in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). While recognizing that the numerous decisions dealing with the creation of municipalities and with taxation clearly state that the due process clause affords no immunity against "mere inequalities in tax burdens . . . as an indirect consequence of a State's exercise of its political powers," the Court noted that the *Hunter* opinion itself "intimates that a state legislature may not be omnipotent even as to the disposition of some types of property owned by municipal corporations." *Gomillion*, 364 U.S. at 344. The Court warned that "exalting" the State's political power to an absolute would "misconceive the reach and rule" of *Hunter* and related cases:

> . . . a correct reading of this seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, ...

Id. at 344.[23]

---

[23] In *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039 (1980) (White, J., dissenting from denial of certiorari), Justice White was critical of what he termed the "per se rule" of standing, finding it to be inconsistent with the decision in *Board of Education v. Allen*, 392 U.S. 236 (1968). In addition, Justice White referenced *Rogers v. Brockette, supra*, a decision upon which a conflicting line of cases has developed.

In this case, the court below operated under such a misconception. Rather than a situation involving the allocation of political authority, it was faced with a set of facts which ran directly to the property interests of the cities, i.e., their water rights and water delivery facilities.[24]

Furthermore, the "creature of the state" rationale simply cannot apply to all Colorado municipalities. The "home rule" provisions of the Colorado Constitution, Colo. Const., Art. XX, Sect. 1 and 6, confirm that the cities are not creatures of the state legislature. Rather, they derive certain powers directly from the state Constitution,[25] powers which cannot be abrogated by legislative fiat. *City of Thornton v. Farmers Reservoir and Irrigation Co.*, 194 Colo. 526, 575 P.2d 382, 389 (1978).[26] Therefore, the language found in *Hunter v. City of Pittsburgh* and *City of Trenton v. New Jersey*, *supra*, allowing the state "at its pleasure" to "modify or withdraw all such powers" to "take without compensation such property," "repeal the charter, and destroy the corporation" is neither relevant nor applicable to the facts presented here. *City of Trenton*, 262 U.S. 182, 187 (1923); *Hunter*, 207 U.S. 161, 178-9 (1907).

Finally, it must not be forgotten that the cities are acting in their proprietary capacity as the owners and developers of decreed conditional water rights. See *City and County of Denver v. Colorado River Water Conservation Dist.*, 696 P.2d

---

[24] The water rights and federal location approvals of the cities are vested property interests. See *Public Serv. Co. of Colorado v. FERC*, 754 F.2d 1555 (10th Cir. 1985), *cert. den.*, 474 U.S. 1081 (1986), *Wiebert v. Rothe Bros.*, 618 P.2d 1367 (Colo. 1980).

[25] One such power bestowed upon Colorado home rule municipalities is the authority "within or without its territorial limits to construct . . . maintain, conduct, and operate water works . . . and everything required therefore . . . ." Colo. Const., Art. XX, Sect. 1.

[26] In addition, the Colorado Supreme Court has expressly stated that "as a home rule city with its own constitutional underpinning, Denver [Colorado Springs and Aurora] was not a political subdivision of the state. . . . " *Mesa Verde Co. v. Montezuma County*, 831 P.2d 482, 485 (Colo. 1992).

730, 742 (Colo. 1985) (in operating a waterworks system a city acts in its proprietary or business capacity and not in its political or governmental capacity); see also *City of New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79 (1891) and *City of Worcester v. Worcester Consol. St. Ry. Co*, 196 U.S. 539, 551-553 (1905). None of the rationale concerning actions by "creatures of the state" is pertinent where a municipality is acting in such a capacity. Rather, it is to be treated essentially the same as a private corporation. *Castlewood Corp. v. Denver*, 41 Colo. App. 565, 567, 594 P.2d 1062 (1978); see also *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) ("private" utility allowed to bring Fifth Amendment takings claim).

B. Federal Preemption

Pursuant to the Property Clause of the United States Constitution, art. IV, § 3, cl. 2, Congress has exclusive and unlimited power over the use and disposition of federally-owned lands. *Kleppe v. New Mexico*, 426 U.S. 529, 537, 539 (1976). State law cannot divest Congress of that power. *Utah Power and Light Co. v. United States*, 243 U.S. 389, 403-405 (1917). Though the state may exercise its civil and criminal jurisdiction over lands belonging to the United States,

> [T]his jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them.

243 U.S. at 404. Stated another way, "where those state laws conflict with . . . legislation passed pursuant to the Property Clause, the law is clear: the state law must recede." *Kleppe*, 426 U.S. at 543; *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-154 (1982).

The question in this case is an extension of that faced by this Court in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), i.e., "whether Congress has enacted legislation respecting this federal land that would preempt" the permit denial by a local branch of government. *Id.* at 581.

> State law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. [Citations deleted]. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, [citations deleted] or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 [85 L.Ed. 581, 61 S.Ct. 399] (1941). *Silkwood v. Kerr-McGee Corp.*, *supra*, at 248, 78 L.Ed.2d 443, 104 S.Ct. 615.

480 U.S. at 581.[27] Just such a conflict and frustration of Congressional interests exists in this instance.

1. Conflict with Federal Laws

The 1897 Organic Administration Act established the management mandate for the forest reserves and identified their primary purposes:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.

16 U.S.C. § 475 (1985). In interpreting the above provision, this Court has held that the national forests were created "for only two purposes", i.e., to secure favorable conditions of water flows for Western settlers and to furnish a continuous supply of timber for the people. *United States v. New Mexico*, 438 U.S. 696, 707, 718 (1978). In particular, favorable water flows were to "be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such

---

[27] Federal regulations have no less preemptive effect than federal statutes. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984).

national forests are situated, or under the laws of the United States and the rules and regulations established thereunder." *Id.* at 712; 16 U.S.C. § 481 (1985).

In rejecting the government's claim in *New Mexico* that Congress intended to reserve water in national forests for "secondary" uses, such as "aesthetic, environmental, recreational, or wildlife preservation purposes," *Id.* at 705, this Court stated:

> Not only is the government's claim that Congress intended to reserve *water for recreation and wildlife* preservation *inconsistent with Congress' failure to recognize these goals as purposes of the national forest, it would defeat the very purpose for which Congress did create the national forest system.* . . . As this provision [16 U.S.C. § 481] and its legislative history evidence, Congress authorized the national forest system principally as a means of *enhancing the quantity of water that would be available to the settlers of the arid West.* The Government, however, would have us now believe that Congress intended to partially defeat this goal by reserving significant amounts of water for *purposes quite inconsistent with this goal.* (emphasis added)

Id. at 712-713. These "inconsistent purposes," i.e., flows for aesthetics, recreation and environmental enhancement, are the very objectives utilized by the County to deny the cities the permits necessary to complete their water delivery system. The conflict between the County's actions and the federal legislative scheme is undeniable.

In addition, the Forest Service Management Plan for the area in question specifically states that the White River National Forest is for multiple use. This is in keeping not only with the language of the Organic Act as quoted above, but also with the provisions of the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. § 1701, 1732 (1986), the National Forest Management Act, 16 U.S.C. § 1600, 1604 (1985), *et seq.*, and the Multiple Use Sustained Yield Act, 16

U.S.C. § 528 (1985).[28] Included within the "multiple uses" encouraged by each of these Acts is water resource development. 43 U.S.C. § 1761(a)(1) (1986) specifically authorizes the Secretary to grant rights-of-way over the national forest system for "reservoirs, canals, ditches, flumes, . . . and other facilities and systems for the impoundment, storage, transportation, or distribution of water." Nothing in these Acts would counsel in favor of "local" supremacy over decisions affecting the forest lands.[29]

Though § 505(a) of FLPMA, 43 U.S.C. § 1765(a) (1986), states that rights-of-way granted thereunder are to contain terms and conditions which "require compliance with *state* standards for . . . environmental protection . . . if those standards are more stringent," the regulations at issue here are "local" in nature, and hence do not fall within the clear terms of the statutory language. *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981); *City and County of Denver v. Bergland*, 695 F.2d 465, 485 (10th Cir.

---

[28] As previously noted, in *Granite Rock*, 480 U.S. at 585, this Court correctly "assumed" that the National Forest Management Act and the Federal Land Policy Management Act "preempt the extension of state *land use* plans onto unpatented mining claims in national forest lands." *Id.* at 585. See 16 U.S.C. § 1604(a) (1985); 43 U.S.C. § 1712(c) (1986). The same preemption analysis holds true for water projects on federal lands.

[29] See, e.g., 43 U.S.C. § 1712(c)(9) (1986) (federal land use plans are to be consistent with state and local land use plans to the "maximum extent" the Secretary "finds consistent with federal law" and the purposes of FLPMA); 16 U.S.C. § 530 (1985) (Secretary is to "cooperate with interested state and local governmental agencies . . . in the management of the national forests"); 16 U.S.C. § 1612(a) (1985) (state and local governments are given an "opportunity to comment upon the formulation of standards, criteria and guidelines applicable to Forest Service programs"). The pertinent federal regulations governing the management of national forests likewise support the cities preemption analysis. See, e.g., 36 C.F.R. Part 219 (1983) (establishment of a coordination effort, § 219.7, wherein local government input is solicited, § 219.6, and an appeal process is available, § 219.10.) However, the Forest Service remains the final decision maker, 36 C.F.R. §§ 219.8, 219.10 (1983).

1982); *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051 (9th Cir. 1985).[30] Further, the Forest Service expressly found that it complied, through the incorporation of stipulations and conditions in the FLPMA permit, with the requirements of this statutory provision, App. 49a-50a, and concluded that "appropriate state and local agencies" would specify "mitigation measures for *non-federal lands* . . . ." App. 46a.[31]

In *Granite Rock*, this Court took as true the Coastal Commission's assertion that it did not seek to veto or prohibit the activity, but only to regulate the environmental aspects thereof. 480 U.S. at 586, 587. Given the "as yet unidentifiable conflicts with the federal scheme" and the "barren record," the Court cautiously accepted the possibility that the state might impose certain reasonable environmental controls. *Id.* at 594.[32] In other words, the state had a role in deciding "how" an activity was to be conducted on federal land, but had no authority to decide "if" that particular activity was going to go forward.[33]

---

[30] As concluded in *Montana v. Johnson*, 738 F.2d 1074 (9th Cir. 1984), this provision of FLPMA does not require compliance with local permit procedures, but only a consideration of state substantive standards by the permitting "federal" agency. In accord, *Columbia Basin*, 643 F.2d at 605 (to require "state" certification "would imply that the state could deny the permit.")

[31] The FLPMA permit indicated that "Eagle County . . . advise[d] the Forest Service that various permits are needed," App. 67a. This is not an indication of Forest Service concurrence in the application or propriety of local regulations, and is certainly not dispositive of the preemption analysis. See *Brubaker*, 652 P.2d at 1057 (since state law is not applicable if it is preempted, the scope of a federal permit's reference to compliance with applicable state and local requirements is dependent upon, rather than determinative of, the proper resolution of the preemption issue).

[32] The "state" regulatory scheme referenced in *Granite Rock*, 480 U.S. at 583, is absent in this instance. See *City and County of Denver v. Bergland*, 695 F.2d 465, 485 (10th Cir. 1982) (regulations under the Colorado Land Use Act are deemed "local" promulgations).

[33] The Court warned that "one may hypothesize a state environmental regulation so severe that a particular land use would become

In the present instance, the record is voluminous and it clearly demonstrates that the County did not seek to impose reasonable environmental conditions. In fact, it made no attempt whatsoever to cooperate with the cities or federal agencies in identifying potential mitigation conditions, arguing instead that it was not the County's duty to propose any mitigation requirements.[34] Rather, the County vetoed the federally-approved project, despite the extensive federal permit requirements which were based on the same set of facts and addressed the very same concerns. The County thus created an irreconcilable conflict with federal law, and erected an unlawful barrier to fulfillment of the water supply purposes of national forests as envisioned by Congress.

As previously indicated, the Colorado Court of Appeals decision is likewise inconsistent with the opinion of the Ninth Circuit in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), aff'd mem., 445 U.S. 947 (1980). See also *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955); *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 164, 181-183 (1946) (local veto power which conflicts with the federal scheme is preempted). As in *Ventura*

---

commercially impracticable." 480 U.S. at 587. To the extent one could characterize the County regulations as "environmental," this is such a situation. The "commercial" value of the Project lies in its yield, yet the county decided that the water should remain in the stream for purposes of wetland flooding, aesthetics, and recreational rafting.

[34] Though the county has argued that it did not prohibit other "alternative projects," this response ignores the fact that (a) Colorado has no NEPA-type statute; (b) the cities had no decree for alternate points of diversion; (c) the cities had only one set of federal permits and easements; (d) the alternatives analysis had already been performed as part of the federal EIS process; (e) the cities had only one Congressional exemption; (f) the county had no alternative analysis requirements in its regulations; (g) the county found the application complete without requiring an alternatives discussion; and (h) the county specifically found, in response to a motion in limine filed by the cities, that it could not require an alternatives analysis.

County, Eagle County seeks to prohibit the federally authorized activity, having denied the requested permits.

Finally, even assuming for purposes of argument that local "denial" authority could be exercised where local "environmental" regulations are being applied, the County's characterization of its findings herein as other than "land use" controls is nothing more than an attempt to definitionally obfuscate the issues.[35]

2. Conflict With Congressional Wilderness Exemption

As noted at the outset, in 1980, Congress provided the Project with a specific exemption from those additional constraints which would be associated with the creation of the Holy Cross Wilderness. That exemption stated, in part:

> Provided, that no right or claim of right, to the diversion and use of existing conditional water rights for the Homestake Water Development Project by the cities of Aurora and Colorado Springs shall be prejudiced, expanded, diminished, altered, or affected by this Act. Nothing in this Act shall be

---

[35] The "quality and quantity of the river rafting experience" is a land use determination, i.e., will the county allow domestic water diversions to support residential and commercial growth or preserve aquatic playgrounds. Similarly, regulation of the area as a "wilderness" is a clear land use choice. Further, the application of "nuisance" factors as a basis for permit denial also constitutes the application of "land use" controls. Nuisance factors, such as increased traffic and dust from construction activities, have been historically characterized as matters within the ambit of the "local zoning" authority. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (a regulatory zoning ordinance is analogous to the common law of nuisance); *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989) (zoning is driven by concerns such as health and safety, aesthetics, or other public values and closely parallels nuisance law); *Robinson Brick Co. v. Luthi*, 115 Colo. 106, 111, 169 P.2d 171 (1946) (where the legislature has declared by statute and zoning resolution what activities may be conducted in a certain zone, it has in effect declared what is a public nuisance).

> construed to expand, abate, impair, impede, or interfere with the construction, maintenance or repair of said project, nor the operation thereof, or any exchange or modification of the same agreed to by the cities and the United States, acting through any appropriate agency thereof.

P.L. 96-560, § 102(a)(5), 94 Stat. 3265 (1980). App. 313a. Thus, a compromise was reached wherein the cities would not oppose the creation of a wilderness area which encompassed their previously decreed points of diversion. In return, development of the cities water rights would not be adversely impacted by the new land designation.[36]

However, both the County and the Colorado Court of Appeals ignored this Congressional directive and specifically considered the impacts of the Project upon so-called "wilderness" values, thereby undermining Congressional intent. See App. 14a; App. 147a-148a.

---

[36] In the Final Environmental Impact Statement for the project, the Forest Service acknowledged the above compromise by stating:

> The wilderness was established recognizing the cities' proposal. As a result, the Homestake Phase II proposal is not subject to the Wilderness Act (16 U.S.C. 1131, *et seq.*). Congress has determined that the Homestake Phase II Project proposal should be reviewed as if it were in a portion of National Forest allocated to non-wilderness use.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN M. DINGESS
DUNCAN, OSTRANDER, VARNELL
& DINGESS, P.C.
7800 East Union Avenue
Suite 200
Denver, CO 80237

GREGORY L. JOHNSON
Assistant City Attorney,
Utilities
30 S. Nevada, Suite 601
Colorado Springs, CO 80903

MARK T. PIFHER*
JONATHAN C. DEHMLOW
ANDERSON, GIANUNZIO, DUDE,
PIFHER & LEBEL, P.C.
104 S. Cascade Avenue
Suite 204
Colorado Springs, CO 80903
(719) 632-3545

*Counsel of Record

INDEX TO APPENDICES

VOLUME I

Appendix A: The decision of the Colorado Court of Appeals reported at 895 P.2d 1105 (1994). App. 1a-33a.

Appendix B: Relevant Portions of the FLPMA permit issued for the Homestake Water Project ("Project") by the United States Forest Service. App. 34a-107a.

Appendix C: Relevant portions of the Section 404 permit issued for the Project by the U.S. Army Corps of Engineers. App. 108a-134a.

Appendix D: The decision of the Colorado Water Quality Control Division certifying that the Project met all applicable state water quality requirements. App. 135a-141a.

Appendix E: The resolution of the Eagle County Board of County Commissioners ("County"), dated February 22, 1988, denying the local land use permits for the Project. App. 142a-156a.

VOLUME II

Appendix F: The resolution of the Eagle County Board of County Commissioners ("County"), dated December 17, 1991, denying the local land use permits for the Project. App. 157a-161a.

Appendix G: The order of the Eagle County District Court dated July 22, 1988, dismissing for lack of standing the claims of the cities brought under the Fifth and Fourteenth

Amendments to the United States Constitution. App. 162a-167a.

Appendix H: The order of the Eagle County District Court dated July 22, 1988, dismissing for lack of standing the claims of the cities brought under the Fifth and Fourteenth Amendments to the United States Constitution. App. 168a-172a.

Appendix I: The initial decision of the Eagle County District Court remanding the case to the Board of County Commissioners. App. 173a-191a.

Appendix J: The decision of the Eagle County District Court finding that the County had denied the cities' due process and acted in an arbitrary and capricious manner in denying the requested permits. App. 192a-206a.

Appendix K: The order of the Eagle County District Court vacating that portion of its prior decision which had required the County to issue the permits. App. 207a-212a.

Appendix L: The Colorado Court of Appeals decision denying the cities Petition for Rehearing. App. 213a.

Appendix M: The Colorado Supreme Court decision denying the cities' Petition for Writ of Certiorari. App. 214a-216a.

Appendix N: Relevant portions of the pleadings and briefs below indicating the manner in which the federal questions were raised App. 217a-269a.

Appendix O: Relevant provisions of the Colorado Land Use Act, C.R.S. §§ 24-65.1-101-502 (1988) are attached as App. 270a-279a.

Appendix P: Relevant provisions of the Eagle County land use regulations promulgated pursuant to C.R.S. § 24-65.1-101-502 (1988) are attached as App. 280a-295a.

Appendix Q: Relevant provisions of the Federal Land Policy Management Act, 43 U.S.C. § 1700-1784 (1986), are attached as App. 296a-300a.

Appendix R: Relevant provisions of the National Forest Management Act, 16 U.S.C. §§ 472a, 476 note, 500, 513, 515, 516, 518, 521b, 528 note, 576b, 581h, 594-2 note, 1600 note, 1600-1614 (1985), are attached as App. 301a-303a.

Appendix S: Relevant provisions of the Organic Act of 1897, 16 U.S.C. §§ 475-481 (1985), are attached as App. 304a-305a.

Appendix T: Relevant provisions of the Multiple Use and Sustained Yield Act, 16 U.S.C. §§ 528-531 (1985), are attached as App. 306a-307a.

Appendix U: The text of the Property Clause of the United States Constitution, art. IV, § 3, cl. 2, is set forth at App. 308a.

Appendix V: The text of the Fifth and Fourteenth Amendments to the United States Constitution are attached as App. 309a-311a.

Appendix W: The text of the Supremacy Clause of the United States Constitution, art. VI, cl. 2, is set forth at App. 312a.

Appendix X: Relevant portions of P.L. 96-560, 94 Stat. 3266 (1980) are attached as App. 313a.

Appendix Y: Relevant portions of the Code of Federal Regulations, 1983 edition, governing the use of federal lands, 36 C.F.R. Part 200 through 299, are set forth at App. 314a-318a.

Appendix Z: Map of Homestake Delivery System is attached as App. 319a.

APPENDIX A

COLORADO COURT OF APPEALS November 17, 1994
No. 93CA0386
No. 93CA0412

City of Colorado Springs and City of Aurora, Colorado, municipal corporations,

Plaintiffs-Appellants and Cross-Appellees,

v.

The Board of County Commissioners of the County of Eagle, State of Colorado; George A. Gates, Johnette Phillips, James E. Johnson, Jr., in their official capacities as individual members of said Board; The Board of County Commissioners of the County of Eagle, in its capacity as the permitting authority under §24-65-101 *et. seq.*, C.R.S.; The Eagle County Planning Commission; Mark Donaldson, Robert Tether, Arlene Quenon, Robert Morris, Donald Price, in their official capacities as individual members of said Commission; The County of Eagle, State of Colorado; Holy Cross Wilderness Defense Fund; and Vail Valley Consolidated Water District,

Defendants-Appellees and Cross-Appellants.

Appeal from the District Court of Eagle County
Honorable William L. Jones, Judge
No. 88CV142

Division III
Opinion by JUDGE DAVIDSON
Jones and Rothenberg, JJ., concur

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED WITH DIRECTIONS

Anderson, Johnson & Gianunzio, P.C., Mark T. Pifher, William Kelly Dude, Colorado Springs, Colorado, for Plaintiffs-Appellants and Cross-Appellees

James R. Fritz, County Attorney, Eagle, Colorado; Holme Roberts & Owen, L.L.C., Dennis J. Herman, Henry W. Ipsen, Mary H. Stuart, Denver, Colorado, for Defendants-Appellees and Cross-Appellants The Board of County Commissioners of the County of Eagle, State of Colorado; George A. Gates, Johnette Phillips, James E. Johnson, Jr.; The Board of County Commissioners of the County of Eagle, State of Colorado; The Eagle County Planning Commission; Mark Donaldson, Robert Tether, Arlene Quenon, Robert Morris, Donald Price; The County of Eagle, State of Colorado

Sierra Club Legal Defense Fund, Lori J. Potter, Denver, Colorado; Land and Water Fund of the Rockies, Frances M. Green, Boulder Colorado, for Defendant-Appellees and Cross-Appellants Holy Cross Wilderness Defense Fund

Grimshaw & Harring, P.C., Wayne B. Schroeder, Ronald L. Fano, Denver, Colorado, for Defendant-Appellees and Cross-Appellants Vail Valley Consolidated Water District

In this action pursuant to C.R.C.P. 106, and C.R.C.P. 57, defendants, Eagle County; the Eagle County Board of Commissioners; George A. Gates, Johnette Phillips, and James E. Johnson, in their official capacities as individual members of the Eagle County Board of Commissioners; the Eagle County Planning Commission; Mark Donaldson, Robert Tether, Arlene Quenon, Robert Morris, and Donald Price, in their official capacities as individual members of the Eagle County Planning Commission (collectively the Board); Holy Cross Wilderness Defense Fund; and Vail Valley Consolidated Water District (Vail

Valley), appeal from the judgment of the trial court vacating a denial of certain land use permits to plaintiffs, the City of Aurora and the City of Colorado Springs (the cities), and remanding the matter to the Board of County Commissioners. The cities cross-appeal from the trial court's dismissal of certain of their claims against the Board. We affirm in part and reverse in part.

The cities hold water rights in the Holy Cross Wilderness area, located in Eagle County. In order to complete a transbasin water diversion project there, the cities applied to the Board for a special use permit, a permit to conduct a major extension of an existing water collection system, and a permit to conduct a municipal water project, pursuant to regulations enacted under §24-65.1-101, et seq., C.R.S. (1988 Repl. Vol. 10B) (the Land Use Act) and §29-20-101, et seq., C.R.S. (1986 Repl. Vol. 12A) (the Local Government Land Use Control Act). After a series of public hearings, the Board denied the permits, and the cities filed this C.R.C.P. 106 action protesting the denial. *See* §24-65.1-502, C.R.S. (1988 Repl. Vol. 10B).

On review, the trial court found that certain of the land use regulations relied upon by the Board to deny the permits were preempted by various state and federal statutes. The trial court then found the remaining regulations, concerning wetlands protection and nuisance factors, to be valid under the Land Use Act, but concluded that it could not discern whether the Board would have denied the permits absent consideration of the preempted regulations. Thus, it vacated the denial of the permits and remanded the matter to the Board for reconsideration.

The Board denied the permits on remand and the cities again appealed. On different grounds, the trial court again vacated the Board's order and, in addition, ordered the Board to approve the permits because it found that the Board had violated due process by improperly refusing to consider a final wetlands mitigation report submitted to the Army Corps of Engineers.

On the Board's motion for reconsideration, the trail court deleted the portion of its order requiring approval of the permits and remanded the matter with instructions to consider the final wetlands mitigation report.

We will address the matter raised by defendants on appeal first and then consider the issues raised by the cities' cross-appeal.

I.

Defendants argue that the trial court's first order vacating the denial of the permits and remanding the matter to the Board was in error. We agree.

A.

Review of an agency decision under C.R.C.P. 106(a)(4) is limited to matters contained within the record of the proceeding before the agency and "[t]he burden is on the [party] challenging the action to overcome the presumption that the agency's acts were proper." *Fedder v. McCurdy*, 768 P.2d 711, 713 (Colo. App. 1988).

Consequently, a court may reverse an administrative tribunal's decision under C.R.C.P. 106 if there is no competent evidence to support its decision, that is, only if

"the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1309 (Colo. 1986); *Platte River Environmental Conservation Organization, Inc. v. National Hog Farms, Inc.*, 804 P.2d 290 (Colo. App. 1990) (The relative merits of the decision are not within the inquiry on review.)

Section 24-65.1-501, C.R.S. (1988 Repl. Vol. 10B) provides that, if a county has designated certain matters as areas or activities of state interest under §24-65.1-401, C.R.S. (1988 Repl. Vol. 10B), and as defined by §§24-65.1-201 and 24-65.1-203, C.R.S. (1988 Repl. Vol. 10B), the county should enact a permitting process for future development.

Pursuant to this authority, the Board designated as activities of state interest the site selection and construction of major new domestic water and sewage treatment systems, major extensions of existing domestic water and sewage treatment systems, and the efficient utilization of municipal and industrial water projects. The Board then developed guidelines for the administration of these designated matters of state interest as required by §24-65.1-402, C.R.S. (1988 Repl. Vol. 10B) and a permitting process as prescribed by §24-65.1-501.

According to §24-65.1-501(4), C.R.S. (1988 Repl. Vol. 10B):

> [The county] may approve an application for a permit to conduct an activity of state interest if the proposed activity complies with the

> [county's] regulations and guidelines for conduct of such activity. If the proposed activity does not comply with the guidelines and regulations, the permit shall be denied.

Here, the trial court found that several, but not all, of the criteria which the Board had applied to the cities' proposed project were preempted. The court then remanded the matter to the Board for reconsideration in light of the remaining criteria.

In doing so, defendants argue, the trial court overlooked the regulatory provisions which implement §24-65.1-501(4), and which dictate that the permit must be denied if the applicant fails to satisfy *all* of the criteria contained in the applicable regulations. We agree.

According to this regulatory scheme – and the cities apparently do not dispute this – if a proposed project fails to satisfy even one criterion, the Board must deny the requested permits. *See* Eagle County Land Use Regulations 6.04.15(2) ("The permit [for a major extension of existing domestic water or sewage treatment system] shall be denied if the applicant fails to satisfy all the criteria outlined in Subsection 6.04.15(1)."); and Eagle County Land Use Regulations 6.05.16(2) ("The permit [for development of a municipal or industrial water project] shall be denied if the applicant fails to satisfy all the criteria outlined above.").

Therefore, the court erred by remanding on the ground that it was unable to ascertain what the Board's decision would have been had the preempted criteria not been considered. The trial court should have focused solely upon whether the record contained any competent

evidence to support the determination that any one of the remaining criteria had not been met.

B.

Defendants next argue that a remand to the trial court at this point is unnecessary as the Board's original decision is supported by competent evidence. Again, we agree.

In a C.R.C.P. 106 appeal, the appellate court is in the same position as the trial court concerning review of the agency proceeding. *Empiregas, Inc. v. County Court*, 713 P.2d 937 (Colo. App. 1985). And, our review of the record reflects ample evidence to support the Board's determination that the criteria in the two areas which the trial court found were not preempted – wetlands protection and nuisance factors – had not been satisfied.

For example, there was extensive testimony at the public hearings that the cities' plan to mitigate the impact of water diversion on the Holy Cross wetlands was deficient and would be ineffective to prevent a substantial destruction of certain plant species in the area, including a rare species of moss which had been found in very few areas in the continental United States. Other witnesses testified that the plans for mitigation of the noise, dust, and other disruptions caused by the construction of tunnels would not prevent a degradation of the recreational and scenic value of the area.

All the findings necessary for a resolution of the issue under the regulatory scheme were made by the Board and are supported by the record. Therefore, the

trial court was required to uphold the denial of the permits; it had no basis upon which to remand the matter for further consideration. *See Garland v. Board of County Commissioners*, 660 P.2d 20 (Colo. App. 1982); *Cline v. City of Boulder*, 35 Colo. App. 349, 532 P.2d 770 (1975).

C.

Because we have concluded that the trial court's first order remanding the matter to the Board for further consideration was erroneous, we need not address either defendants' or the cities' arguments concerning the effect of the Board's subsequent refusal to take administrative notice of the final wetlands mitigation report.

D.

Similarly, because we have determined that the trial court's first order was invalid, and that the Board's original order is supported by competent evidence in the record, we need not reach defendants' argument that the trial court erred by finding that certain of the Eagle County Land Use regulations were preempted.

II.

After it determined that certain specific Eagle County Land Use regulations were preempted by state and federal regulation, the trial court found, *inter alia*, that the Board had relied properly upon regulations concerning wetlands protection and nuisance factors. On cross-appeal, the cities argue that, even if there is competent evidence in the record to support the Board's decision,

the Board exceeded its authority by enacting and applying the non-preempted regulations.

Specifically, the cities contend that the Board exceeded its statutory authority because the wetlands and nuisance regulations, as enacted, and as applied to their permit applications, do not serve the objectives of the statutory criteria set forth in §24-65.1-204. We disagree and conclude that the regulations do not exceed the statutory authority of the Land Use Act and the Local Government Land Use Control Act, either facially or as applied by the Board.

Section 24-65.1-204, provides, in pertinent part:

> (1)(a) New domestic water and sewage treatment systems shall be constructed in areas which will result in the proper utilization of existing treatment plants and the orderly development of domestic water and sewage treatment systems of adjacent communities.
>
> (b) Major extensions of domestic water and sewage treatment systems shall be permitted in those areas in which the anticipated growth and development that may occur as a result of such extension can be accommodated within the financial and environmental capacity of the area to sustain such growth and development. . . .
>
> (8) Municipal and industrial water projects shall emphasize the most efficient use of water, including, to the extent permissible under existing law, the recycling and reuse of water. Urban development, population densities, and site layout and design of storm water and sanitation systems shall be accomplished in a manner that

> will prevent the pollution of aquifer recharge areas.

The Board found that the cities' application for a major extension of a domestic water system did not meet the criteria set out in Eagle County Land Use Regulation 6.04.15(1)(o) which states that:

> The proposed development or its associated collector or distribution system will not significantly deteriorate aquatic habitats, marshlands and wetlands, groundwater recharge areas, steeply sloping or unstable terrain, forests and woodlands, critical wildlife habitat, big game migratory routes, calving grounds, migratory ponds, nesting areas and the habitats of rare and endangered species, public outdoor recreational areas, and unique areas of geologic, historic or archaeological importance.

The Board also found that the cities' application for a major extension of a domestic water system did not meet the criteria in Eagle County Land Use Regulation 6.04.15(1)(p) which states that:

> The proposed development or its associated collector or distribution system will not significantly degrade existing natural scenic characteristics, create blight, or cause other nuisance factors such as excessive noise or obnoxious odors.

Finally, the Board found that the cities' application for development of a municipal water project did not meet the requirements of Eagle County Land Use Regulations 6.05.15(1)(g) which states that:

> The proposed development and the potential diversions of water from the source development area will not significantly deteriorate aquatic habitats, marshlands and wetlands, groundwater recharge areas, steeply sloping or unstable terrain, forests and woodlands, critical wildlife habitat, big game migratory routes, calving grounds, migratory ponds, nesting areas and the habitats of rare and endangered species, public outdoor recreational areas, and unique areas of geologic, historic or archaeological importance.

The cities' appear to make three distinct arguments in regard to these regulations.

A.

The cities first argue that the wetlands and nuisance regulations do not relate to the statutory guidelines. We disagree.

Section 24-65.1-402(3), C.R.S. (1988 Repl. Vol. 10B), states that: "No provision of this article shall be construed as prohibiting a local government from adopting guidelines or regulations containing requirements which are more stringent than the requirements of the criteria listed in [§24-65.1-204]."

When considering an argument that §24-65.1-402(3) represents an unconstitutional delegation of legislative powers to local governments because the grant of authority to regulate activities of state interest lacked specificity, the supreme court found that the broad and general grant of authority afforded by this provision was understandable "since the guidelines contained in [§24-65.1-204] are

phrased in general terms to provide local governments with the flexibility to achieve the objectives in the guidelines in an efficient manner. Even though local governments may adopt more stringent regulations, the regulations must still serve the objectives contained in the guidelines in [§24-65.1-204]." *City & County of Denver v. Board of County Commissioners*, 782 P.2d 753, 760 (Colo. 1989).

Eagle County Land Use Regulation 6.04.15(o) requires, *inter alia*, that the proposed development must not significantly deteriorate aquatic habitats, marshlands, and wetlands. Regulation 6.04.15(p) requires that the proposed project will not significantly degrade existing natural scenic characteristics, create blight, or cause other nuisances such as excessive noise and obnoxious odors.

The Board, within its authority to enact "more stringent" regulations, could determine that the environmental capacity to accommodate development, as set forth in §24-65.1-204(1)(b), C.R.S. (1988 Repl. Vol. 10B) should include consideration of the potential impact on naturally occurring aquatic habitats, marshlands, wetlands, and scenic characteristics within that area and also consideration of the effect of noise and odors associated with the project.

Similarly, Eagle County Land Use Regulation 6.05.15(g) requires, *inter alia*, that the proposed project must not, by the diversion of water, significantly deteriorate aquatic habitats, marshlands, and wetlands. Again, within its authority to enact "more stringent" regulations, the Board could determine that a water diversion project that significantly alters aquatic habitats, marshlands, and

wetlands from their natural state without adequate mitigation is not one which emphasizes the efficient use of water as prescribed by §24-65.1-204(8).

B.

The cities' apparently also are challenging the authority of the Board to apply the statutory criteria set forth in §24-65.1-204 if the end users of the water are located elsewhere. Again, we do not agree.

If the statutory authority to regulate the development of water projects extends only to the area in which the water is to be used, the Land Use Act could never enable a county to regulate construction of water diversion projects located within the county but which transport water to end users outside the county. In our view, this was not the result intended by the General Assembly.

The supreme court has determined that the construction and operation of municipal water projects outside municipal boundaries is a matter of concern to the municipality but is also a matter of concern to the area in which the municipality proposes to build and operate the project. *See City & County of Denver v. Board of County Commissioners, supra.* Certainly, it is questionable to characterize such a project as one of solely municipal concern. *See City & County of Denver v. Bergland,* 517 F. Supp. 155 (D.Colo. 1981), *modified on other grounds,* 695 F.2d 465 (10th Cir. 1983).

This is especially true in circumstances such as here in which the water project is to be located on public land accessible to anyone who cares to journey to Eagle

County to visit the area. The environmental impact of the cities' proposed project upon this public land, designated a wilderness area by the federal government, will have consequences for all Colorado citizens.

Interpreting the statute to mean that the Board cannot apply its regulatory criteria here because the Board cannot presume to control growth, development, and use of existing facilities in the cities would eviscerate a fundamental objective of the Land Use Act.

To the contrary, as the supreme court concluded, although a municipality may possess the right to construct water projects outside its borders, it must nonetheless submit to the permit process as provided by the Land Use Act. *See City & County of Denver v. Board of County Commissioners, supra.* Thus, the regulations enacted by the Board are applicable to development of water diversion projects which are located within Eagle County even if the end users of the water are not.

C.

The cities' also appear to contend that because, in its order, the Board stated that certain Eagle County Land Use regulation criteria – which mirror statutory criteria contained in §24-65.1-204(1)(b) and §24-65.1-204(8), C.R.S. (1988 Repl. Vol. 10B) – did not apply to the cities' permit applications, the Board lacked the authority to apply any other regulations.

During preliminary proceedings before the Board, the cities argued *in limine* that the need for the water project within the cities and the impact of the project

upon the cities were issues which should not be considered in the permitting process because these matters were beyond the control of Eagle County. The Board agreed, and in its order denying the permits, the Board specified that Eagle County Land Use Regulations 6.04.15(1)(e), (f), (g), (h), (i), (j), and (s) and 6.05.15(a) and (e) did not apply. All of these regulations relate to the need and impact of the water projects within the cities. Regulation 6.04.15(1)(a), which contains language almost precisely mirroring §24-65.1-204(1)(b) and 6.05.15(1)(c), which mirrors the language of 24-65.1-204(8), were also specified as inapplicable to the cities' applications, presumably for the same reasons.

By agreeing that 6.04.15(1)(a) and 6.05.15(1)(c) did not apply to their permit applications, the cities contend, the Board lacked any authority to deny them. According to the cities, the only legitimate criteria for permit approval are those criteria which emphasize "statewide concerns," and which are enumerated in §§24-65.1-204(1)(b) and 24-65.1-204(8). We disagree.

As discussed, §§24-65.1-204(1)(b) and 24-65.1-204(8) are relevant not only to the geographical area in which the water is to be used, but also to the geographical area where the water project is to be located. *See City & County of Denver v. Board of County Commissioners, supra.* The entire purpose of the permitting process here was to determine if the expected impact of the proposed project on the area in which it was to be built would meet the statutory and regulatory criteria.

Without determining whether the Board was correct in completely excluding any consideration of the need for

or impacts of the proposed projects in and upon the cities, based upon the dual applicability of §24-65.1-204(1)(b) and 24-65.1-204(8), we interpret the Board's findings as excluding regulations 6.04.15(1)(a) and 6.05.15(1)(c) from consideration only to the extent that they relate to impacts of the project outside the county boundaries.

III.

Next, the cities assert several facial constitutional challenges to the regulations. We reject each, in turn.

A.

The cities assert that the Eagle County regulations are unconstitutionally vague. We do not agree.

When determining whether a regulation is impermissibly vague, the words and phrases employed must be considered by the interpreting court in light of their generally accepted meaning. *Colorado State Board of Medical Examiners v. Hoffner*, 832 P.2d 1062 (Colo. App. 1992). Moreover, "courts will attempt to construe [the legislation challenged on vagueness grounds] in a manner which will satisfy constitutional due process requirements, if reasonable and practical construction of the [legislation] will achieve such result." *See People v. Rostad*, 669 P.2d 126, 127 (Colo. 1983).

"The due process clause, in part, requires that a regulation not be so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Watson v. Board of Regents*, 182

Colo. 307, 313, 512 P.2d 1162, 1165 (1973). The regulation, however, need not be drafted with mathematical precision because the terms used must be general enough to deal with the problem addressed by the regulation under diverse circumstances. *Regency Services Corp. v. Board of County Commissioners*, 819 P.2d 1049 (Colo. 1991).

According to the cities, persons of ordinary intelligence must guess at the meaning of Eagle County Land Use Code §§6.03.15.1 and 6.03.15.1.p which provide that a project may not "significantly deteriorate" aquatic habitats and wetlands and may not "significantly degrade" existing natural scenic characteristics. We disagree.

"Degrade" means "to lower in grade or desirability." *See* Webster's Third New International Dictionary 594. "Deteriorate" means "to make inferior in quality or value." *See Webster's Third New International Dictionary* 616. "Significant" means "deserving to be considered; important; notable," and "significantly," thus means "to a significant degree." *See Webster's Third New International Dictionary* 2116. The antonyms of "significant" include meaningless, trivial, trifling, paltry, and picayune. *See Roget's Thesaurus* 639 (Bantam Rev. Ed. 1990).

"Significant" is a term used extensively throughout statutory language in Colorado to describe the extent of a specific status or condition. *See* §13-21-401(1), C.R.S. (1987 Repl. Vol. 6A) ("[Manufacturer] also includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer."); §16-4-101(1)(b), C.R.S. (1994 Cum. Supp.) (no bail required in cases of certain crimes of violence if the court finds the proof is evident that the

crime occurred and that "the public would be placed in significant peril if the accused were released"); §22-20-103(1.5), C.R.S. (1994 Cum. Supp.) (children with disabilities includes children with "significant limited intellectual capacity" or "significant identifiable emotional disorder[s]"). Indeed, our research has revealed over 200 statutory sections which have used the term without any reported interpretative difficulty.

"Significantly deteriorate" as applied to aquatic habitats and wetlands plainly means to make inferior in quality or value to a significant, as opposed to trivial, degree. "Significantly degrade" as applied to natural scenic characteristics plainly means to lower in grade or desirability to a significant, as opposed to trifling, degree.

The terms encompass the degradation or deterioration of the naturally occurring habitat or scenic characteristics to such a degree as to be worthy of consideration. Thus, we conclude that the regulations are not unconstitutionally vague.

B.

The cities also challenge the requirement in Eagle County Land Use Code §6.04.15.1.1 that the benefits of the project outweigh the losses of any natural resources. According to the cities, neither they, nor the Board, could reasonably perform such a balancing.

However, the concept of balancing or of weighing benefits against risk of loss is common in our jurisprudence. *See Moody v. Corsentino*, 843 P.2d 1355 (Colo. 1993) (assessing whether a defendant's speedy trial right have

been infringed requires the court to apply a four-part balancing test); *People v. Rister*, 803 P.2d 483 (Colo. 1990) (assessing the constitutionality of highway sobriety checkpoints requires the court to balance the state's interest in preventing drunken driving against the privacy interests of the drivers who are briefly stopped); *Belle Bonfils Memorial Blood Center v. District Court*, 763 P.2d 1003 (Colo. 1988) (when determining to what extent materials sought by pretrial discovery may be protected the trial court must balance the competing interests that would be served by granting or denying disclosure); *Camacho v. Honda Motor Co.*, 741 P.2d 1240 (Colo. 1987) (in product liability cases certain factors are of value in balancing the attendant risks and benefits of a product to determine if it is unreasonably dangerous); *Barrett v. University of Colorado Health Sciences Center*, 851 P.2d 258 (Colo. App. 1993) (determining whether a public employee's speech is constitutionally protected requires balancing the interests of the employee in commenting on matters of public concern against the interests of the state in the efficient provision of public services).

The Board, acting in its quasi-judicial capacity, is capable of performing a balancing test which weighs the potential adverse environmental impact of the project against its potential benefits. Contrary to the cities' contention, the regulations do not lend themselves to arbitrary and discriminatory enforcement simply because they require balancing benefits against the risk of loss of natural resources. *See City of Lakewood v. Colfax Unlimited Ass'n*, 634 P.2d 52 (Colo. 1981).

C.

The cities also contend that the Eagle County Land Use regulations relied upon to deny the permits are unduly oppressive because they require the preservation of "purely subjective scenic characteristics" at the expense of the cities' constitutional and statutory entitlement to water. According to the cities, if they must comply with the Board's criteria for wetlands protection and nuisance factor limitations, they will be unable to exercise their validly held water rights. We disagree.

Section 24-65.1-106(1)(b), C.R.S. (1988 Repl. Vol. 10B) provides that nothing in the Land Use Act shall be construed as "[m]odifying or amending existing laws or court decrees with respect to the determination and administration of water rights." This provision does not give the holder of any pre-existing water rights a blanket exemption from regulation by local governments, but may afford a basis for invalidating particular regulations. *City & County of Denver v. Board of County Commissioners, supra.*

Every local government exercise of land use regulation is likely to affect the legitimate property interests of would be developers in some manner. *See Tri-State Generation & Transmission Ass'n v. Board of County Commissioners,* 42 Colo. App. 479, 600 P.2d 103 (1979). The existence of previously decreed water rights does not provide an exemption for the developer from regulation under the Land Use Act; so long as the regulations do not serve to undermine these established water rights, they are a valid exercise of authority. *City & County of Denver v. Board of County Commissioners, supra.*

As discussed, the trial court correctly concluded that the regulations pertaining to wetlands protection and nuisance factors were a proper exercise of authority to enact more stringent guidelines than those embodied by the Land Use Act. *See* §24-65.1-402(3).

At the insistence of the cities, the Board limited its consideration to the water project as proposed, and did not consider whether any alternative configurations could be designed which would meet the regulatory criteria. Although the permits for the project were denied, the cities are not prohibited from resubmitting the proposed project with changes or from submitting a different proposal. The cities have not demonstrated that such alternatives are unfeasible.

The cities' entitlement to take the water from the Eagle River basin, while a valid property right, should not be understood to carry with it absolute rights to build and operate any particular water diversion project. *See City & County of Denver v. Bergland, supra.* We do not perceive any undue interference with the exercise of the cities' established water rights.

IV.

The cities also argue that, even if the Board has the power to regulate the proposed project under the Land Use Act, its regulations concerning wetlands protection and nuisance abatement bear no reasonable relationship to valid county concerns. We disagree.

To the contrary, the General Assembly has explicitly endorsed environmental concerns as a legitimate concern

in land use planning by local governments. As used in the Local Government Land Use Control Act, "local government" includes counties. *See* §29-20-103, C.R.S. (1986 Repl. Vol. 12A).

Section 29-20-102, C.R.S. (1986 Repl. Vol. 12A) declares that: "[I]n order to provide for planned and orderly development within Colorado and a balancing of basic human needs of a changing population with legitimate environmental concerns, the policy of this state is to clarify and provide broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions."

Section 29-20-104(1)(h), C.R.S. (1986 Repl. Vol. 12A) further provides that each local government has the authority to plan for and regulate land use within its jurisdiction "so as to provide planned and orderly use of land and protection of the environment in a manner consistent with constitutional rights."

We therefore reject the cities' contention that the Eagle County regulations are unrelated to any valid county concern.

V.

The cities next argue that, even if the Board may impose reasonable regulations upon the water diversion project and reasonable conditions upon project design and construction, it lacks statutory authority to deny the permits here. We disagree.

Contrary to the cities' contention, the denial of the permit applications was not an illegal abrogation of the cities' home rule powers.

As determined by the supreme court, the Land Use Act gives the Board the power to regulate, but not to prohibit, the operation of extraterritorial water projects. *City & County of Denver v. Board of County Commissioners, supra.* The Land Use Act itself specifically provides that, pursuant to regulations adopted by the county, a permit may be granted or denied after hearing on the matter. *See* §24-65.1-501.

Here, the cities' contentions notwithstanding, no outright abrogation of the cities' home rule powers to construct, condemn, purchase, acquire, lease, add to, maintain, conduct, and operate extraterritorial water works under Colo. Const. art. XX, §1, occurred. Therefore, *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 575 P.2d 382 (1978), relied upon by the cities, is inapplicable.

As determined by *City & County of Denver v. Board of County Commissioners, supra,* construction of water diversion projects is a matter of mixed local and state concern and home rule cities must submit to the permit process. The cities have not been prohibited from submitting a substitute proposal. The denial of their permit applications affects this particular project only and not their right to construct and maintain extraterritorial water works.

B.

The cities next argue that the ability of the Board to deny their permit applications was circumscribed by §24-65.1-105(1), C.R.S. (1988 Repl. Vol. 10B). Again, we reject their analysis.

Section 24-65.1-105(1), provides that, with regard to public utilities: "[N]othing in this article shall be construed as enhancing or diminishing the power and authority of municipalities, counties, or the public utilities commission" and "[t]he public utilities commission and public utilities shall take into consideration and, when feasible, foster compliance with adopted land use master plans of local governments. . . . "

According to the cities, all that was required of them pursuant to §24-65.1-105(1), was to "take into consideration" and "foster compliance" with Eagle County's concerns. They contend that this requirement was served by the public hearing process during which Eagle county was "able to assess the project proposal and place its concerns on the record." The cities claim that despite this voluntary "accommodation" of Eagle County's concerns, the Board attempted to "veto" the project by denying the permits. We reject the cities' contention on several grounds.

First, the cities' contention that §24-65.1-105(1) exempts a municipally operated utility from the permit process under the Land Use Act was rejected in *City & County of Denver v. Board of County Commissioners, supra.* Although the supreme court stated in that case that §24-65.1-105(1) "may provide the courts with a basis for invalidating particular local regulations," it nevertheless

found that the subsection does not "exempt [municipal] water projects from every conceivable regulatory scheme." *City & County of Denver v. Board of County Commissioners, supra,* 782 P.2d at 764. The cities' argument here is no different from the general attack upon the validity of the permit process rejected in that case, and we view that ruling as controlling.

In a closely related argument, the cities characterize "cooperation with the permit process" as equivalent to "consideration of and fostering compliance with" the adopted land use master plans of Eagle County. In other words, because they voluntarily followed the permit process and submitted a proposal, the cities suppose that they have demonstrated a willingness to cooperate with Eagle County's land use plans. Even if that were all that was required of them, the record does not support this contention.

The regulations utilized by the Board in evaluating the cities' applications are specific regulations adopted to control the construction and operation of domestic water supply projects and municipal water projects. Although they may be related to the Eagle County land use master plan, they are enacted for a more specific purpose. Consideration of, and fostering compliance with, the Eagle County land use master plan perhaps fulfills a particular requirement of §24-65.1-105(1), but such does not begin to fulfill the extensive permitting process envisioned by the remainder of the Land Use Act.

Moreover, the record reveals no indication that the cities were willing to alter any aspect of the project. To

the contrary, the cities have argued that they may disregard Eagle County concerns because Eagle County lacks any regulatory authority over the project.

Further, insofar as the cities contend that a municipally owned utility is only required to consider and, when feasible, foster compliance with local government land use master plans, such an interpretation would render the rest of the Land Use Act irrelevant to public utilities. The supreme court rejected this result in *City & County of Denver v. Board of County Commissioners, supra.*

C.

The cities next contend that the Board's power to deny the permits is circumscribed by §30-28-110, C.R.S. (1986 Repl. Vol. 12A). The cities maintain that this provision supersedes the permitting process prescribed by the Land Use Act and thus precludes denial of their permits. Again, we do not agree.

1.

Section 30-28-110(1)(c), C.R.S. (1986 Repl. Vol. 12A) provides, *inter alia,* that although counties may regulate the construction by utilities, if the particular project "is one the authorization or financing of which does not, under the law governing the same, fall within the province of the board of county commissioners or other county officials or board, the submission to the [county planning commission] shall be by the body having such

jurisdiction, and commission's disapproval may be overruled by said body by a vote of not less than a majority of its entire membership or by said official."

Again, the cities' contention that §30-28-110 exempts municipal utilities from local government regulation of extraterritorial water projects was raised and rejected in *City & County of Denver v. Board of County Commissioners, supra.* The court found that §30-28-110 was not facially inconsistent with the Land Use Act and that any arguable power of a municipality to "overrule planning commission disapproval of a project does not give [the municipality] the unrestricted authority to ignore regulations adopted pursuant to the Land Use Act." *City & County of Denver v. Board of County Commissioners, supra,* 782 P.2d at 766. Therefore, that case is controlling here.

2.

The cities argue, however, because §30-28-110 was adopted later in time than the Land Use Act, §30-28-110 controls. They contend that, in order to read the statutes harmoniously and avoid inconsistency, we must assume that the General Assembly knew that the later statute would deprive local governments of the power to deny a permit to a municipal utility and thus intended to relegate local governments to a purely advisory role. We do not agree.

Section 24-65.1-501(4) provides specific authority for a local government to approve or deny a permit to conduct activities of state interest. The cities argue that, in order to harmonize the two statutory sections, we must read the provision of §30-28-110(1)(c), allowing municipal

utility override of a county planning commission disapproval of a project, as a modification of §24-65.1-501(4).

Although the cities maintain that this does not amount to a *revocation* of §24-65:1-501(4), we are at a loss to ascertain what else it could be. If §30-28-110(1)(c) prevails, then §24-65.1-501(4) is nullified.

Statutes upon the same subject must be construed together and any conflicts reconciled if possible to give effect to the legislative purposes behind each section; particular statutes will prevail over general, and later provisions over former. *State v. Borquez*, 751 P.2d 639, 643 (Colo. 1988). If the statutory sections are irreconcilable, "the statute prevails which is latest in its effective date." Section 2-4-206, C.R.S. (1980 Repl. Vol. 1B).

Nonetheless, before a later statute of general terms is deemed to revoke an existing provision of a statute which is specific in its terms, there must be a clear and unmistakable intent to do so. *See Smith v. Zufelt*, ___ P.2d ___, ___ (Colo. No. 92SC845, September 12, 1994) ("[T]he 'last-in-time' approach is inapposite where one statute more specifically addresses the situation at issue."); *People in Interest of E.Z.L.*, 815 P.2d 987 (Colo. App. 1991); §2-4-205, C.R.S. (1980 Repl. Vol. 1B).

To the extent there is conflict, the Land Use Act specifically addresses the situation at issue – water projects designated as activities of state interest by the appropriate unit of local government. Therefore, we conclude that the General Assembly intended the permitting process of §24-65.1-501 to apply to utility projects which involve designated activities of state interest and §30-28-110(1)(c) to apply to any other utility project.

Thus, §24-65.1-501(4) prevails as it is a specific exception to §30-28-110(1)(c), a statute of broader scope. *See Husson v. Meeker*, 813 P.2d 731 (Colo. App. 1991).

V.

Finally, the cities argue that the trial court erred in determining that they lacked standing to pursue Fourteenth Amendment based substantive due process and regulatory taking claims against the Board. We disagree.

A.

A municipality lacks standing to assert a substantive due process claim because it is but a creature of the state and cannot invoke the provision of the Fourteenth Amendment in opposition to the will of the state and because the Fourteenth Amendment does not impose restrictions upon the relationships between one political subdivision of a state and another. *See Town of Orchard City v. Board of Delta County Commissioners*, 751 P.2d 1003 (Colo. 1988); *see also Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986).

In contrast, municipal corporations are not barred from asserting procedural due process claims. *See City & County of Denver v. Eggert*, 647 P.2d 216 (Colo. 1982). Procedural due process, however, was not the basis for the cities' sixth and twelfth claims.

B.

Similarly, because the cities failed to establish standing to assert these claims, they also were not entitled to invoke the Civil Rights Act, 42 U.S.C. §1983 (1988). That legislation does not create any substantive federal rights but merely provides a remedy for violations of other federal statutory or constitutional rights. *See Tafova v. Adams*, 816 F.2d 555 (10th Cir. 1987); *South Macomb Disposal Authority v. Township of Washington, supra*. Furthermore, governmental entities are not protected "persons" under §1983. *Commonwealth of Pennsylvania v. Porter*, 659 F.2d 306 (1981).

C.

Neither does the cities' home rule status, derived from Colo. Const. art. XX, confer standing upon them to invoke the Fourteenth Amendment. Municipalities and counties exist for the convenient administration of government and are instruments to carry out the will of the state; whether statutory or created under the constitution, municipalities have no privileges or immunities under the state constitution. *Enger v. Walker Field*, 181 Colo. 253, 508 P.2d 1245 (1973); *Board of County Commissioners v. E-470 Public Highway Authority*, ___ P.2d ___ (Colo. App. No. 93CA1292, March 24, 1994) (*cert. granted* October 11, 1994).

The state thus retains a measure of control over its home-rule municipalities. *See Voss v. Lundvail Brothers, Inc.*, 830 P.2d 1061 (Colo. 1992) (in matters of mixed local and statewide concern, a home-rule municipal ordinance

may not coexist with a conflicting state statute, the ordinance is superseded); *Vick v. People*, 166 Colo. 565, 445 P.2d 220 (1968) (a home rule city has authority which allows its ordinances to coexist with state ordinances concerning the same matters only insofar as they are not in conflict); *cf. Village of Arlington Heights v. Regional Transportation Authority*, 653 F.2d 1149 (7th Cir. 1981) (although Illinois home rule provisions changed the relationship of the State to the home rule municipalities in some respects, the State retained a general power of control over its political subdivisions and the Fourteenth Amendment restraints against state action do not apply against the State in favor of its home rule municipalities).

D.

That the cities are operating their water systems in a proprietary rather than governmental capacity also does not provide them with standing to invoke the Fourteenth Amendment.

The governmental/proprietary function distinction is subject to criticism and has been limited in its application. *See Colowyo Coal Co. v. City of Colorado Springs*, 879 P.2d 438 (Colo. App. 1994); *see also City & County of Denver v. Mountain States Telephone & Telegraph Co.*, 754 P.2d 1172 (Colo. 1988). Even if the distinction is viable, however, it has not been considered a sufficient basis for allowing municipalities to invoke the Fourteenth Amendment. *See City of Trenton v. State of New Jersey*, 262 U.S. 182; 43 S.Ct. 534, 67 L.Ed. 937 (1923) (because governmental and proprietary distinction is a court developed doctrine based on vague distinctions used primarily as a

method of escaping difficulties in the application of tort liability, the Court rejected argument that it provided an analytical framework upon which a municipality could invoke federal constitutional provisions against the state).

E.

Finally, we reject the cities' contention that *Town of Orchard City v. Delta County Commissioners, supra,* has been eroded by *City of Montrose v. Public Utilities Commission,* 629 P.2d 619 (Colo. 1981) (court rejected a municipality's Fourteenth Amendment argument on the merits without addressing standing issue). Therefore, we conclude that the trial court did not err by dismissing the cities' sixth and twelfth claims and by denying leave to amend the complaint to add a fifteenth claim.

VI.

In sum, the record of the proceedings before the Board contains competent evidence to support its determination that all of the applicable criteria had not been satisfied. We further conclude that the Eagle County regulations are within the authority granted in connection with the administration of activities of state interest and are not violative of any constitutional provisions. Thus, the decision of the Board must be reinstated. *See Ross v. Fire & Police Pension Ass'n, supra.*

Accordingly, the judgment of the trial court vacating the Board's order is reversed, and the cause is remanded to the trial court with instructions to reinstate the decision of the Board. The judgment dismissing the cities'

sixth and twelfth claims and denying leave to amend the complaint to add a fifteenth claim is affirmed.

JUDGE JONES and JUDGE ROTHENBERG concur.

APPENDIX B

Record of Decision
for
HOMESTAKE PHASE II PROJECT
Final Environmental Impact Statement

Rocky Mountain Region
White River National Forest
USDA Forest Service
Eagle County, Colorado

I. INTRODUCTION

This Record of Decision documents the decisions reached by the Forest Service regarding the application for land use made by the Cities of Colorado Springs and Aurora concerning the Homestake Phase II Project. The regulations implementing the National Environmental Policy Act (40 CFR 1500-1508) require that each Federal agency, having a decision to make, prepare a concise public Record of Decision at the time of the decision. This is that required Record and it is limited to the authority and jurisdiction of the Forest Service and, therefore, applies only to activities on National Forest System lands (FEIS Section 1.2, pages 1-4 to 1-8). It also describes the alternatives considered, documents the conditions and stipulations that are associated with the decisions, summarizes the coordination with other governmental agencies, and describes public involvement that took place.

On June 19, 1981, a revised Environmental Impact Report was submitted by the Cities to the White River National Forest with preliminary plans to apply for an easement to construct the second phase of a water collection system on National Forest System (NFS) land. The plans proposed developments which were substantially different

from the system outlined in the 1960 easement granted by the Bureau of Land Management (BLM) and assigned to the Cities of Aurora and Colorado Springs on July 31, 1962. The Forest Service subsequently informed the Cities that the proposal could not be approved until an Environmental Assessment was completed (FEIS Section 1.1, page 1-4). Subsequently, on August 18, 1981, the Forest Service and the Cities signed a Memorandum of Understanding to study the proposal. On December 30, 1981, the Forest Service filed a Notice of Intent to Prepare an Environmental Impact Statement (EIS). The Notice was published in the Federal Register on January 7, 1982 (FEIS Section 6.1.6, pages 6-1 to 6-5).

The Forest Service, as lead agency, has the primary responsibility for preparing the Environmental Impact Statement (EIS). The cooperating agencies listed in Exhibit 1 and other Federal, State, and local agencies, organizations, and individuals contributed to the Final Environmental Impact Statement (FEIS). The FEIS is a document disclosing the environmental consequences of implementation of the proposed action and alternatives to the proposed action. It is an important document for Federal, State, and local governments to use in arriving at their individual decisions regarding the proposed action and the alternatives to it (FEIS Section 1.2, page 1-7).

The Forest Service has identified ten approvals or decisions which may be needed from the Forest Service, cooperating agencies, and other Federal, State, and local agencies. Only one authorization is required from the Forest Service. In addition, the Forest Service and the Corps of Engineers has consulted with the U.S. Department of the Interior to determine the effects of the project

on threatened and endangered species. The remaining actions are the responsibility of other Federal, State, or local agencies. These are listed in Exhibit 1, attached (FEIS Section 1.6.2, pages 1-18 and 1-19).

II. ISSUES AND CONCERNS

Water development proposals such as the Homestake Project bring many issues and concerns to the surface. The public comments on the DEIS, the many letters received since the comment period ended, the hearing conducted by the House Subcommittee on Public Lands and National Parks, and the news and feature articles in newspapers and on television all indicate that water diversion proposals generate a wide variety of responses, including some that are intensely personal and emotional. The facts of Colorado's climate, topography, and social development intensify and polarize the water issue. The State is divided by the Continental Divide into east and west slope interests. The major population centers are on the eastern slope, where there is a shortage of water; the lack of water on the eastern slope results in an east-west and a growth-no growth conflict. This is unfortunate but understandable since water is a necessary ingredient for economic growth and development, the continuation of preferred lifestyles, and for an enjoyable and healthful environment (FEIS Section 1.4, pages 1-11 to 1-16).

Several public issues can be identified as underlying the concern over transporting water from western Colorado across the Continental Divide to Colorado's Front Range

communities. One is the desire of western Colorado interests to retain water which may be needed to serve future needs such as recreation and industrial growth. A second is whether growth along the Front Range is fostered by water development and, if so, whether growth should be controlled by limiting water availability. A third is whether current agricultural uses along the Front Range should be reduced or eliminated so that agricultural water could be used as municipal supplies in lieu of additional west slope diversion. These are serious and troublesome problems. They are, however, by and large institutional rather than technical problems. A "water crisis" aura has been created by conflicting laws and regulations, political motives, agency missions, social customs, the seeming inability of west slope water users to fund water developments, and an outdated belief that water is "free for the taking." These conflicts are not being resolved and it appears that our institutional systems are floundering at an elementary level.

The Forest Service recognizes this situation. Because of our responsibility to manage the Federal lands where many water developments occur, we are involved in controversies. For example, in the last five years, two of Denver's water projects, Foothills and Williams Fork, resulted in extensive litigation and the Cheyenne, Wyoming transmountain diversion is under litigation now. This will not change in the future.

In addition to the broad public issues, the Forest Service identified five specific issues that provided the focus of the Homestake Phase II Project (FEIS Sections 1.5.2 and 1.5.3, pages 1-16 to 1-18). These are:

A. Effects of the proposal on the Holy Cross Wilderness values.

In my judgment this is the most important issue to many of the individuals who commented on the Draft EIS (DEIS). There is severe criticism of the project on the basis that it is in conflict with the intent and purpose of wilderness as defined by the Wilderness Act of 1964. While I agree that the project is contrary to the concept and philosophy of wilderness, it is specifically provided in the law establishing the Holy Cross Wilderness that the creation of the Wilderness will not be considered in determining whether or not to permit the use of National Forest System lands for the Homestake Project purposes. (See Section V.D. of this document and FEIS Sections 1.4, pages 1-11, 1-12; 3.1.6, pages 3-14 to 3-16; 4.1.6, pages 4-36 to 4-39.)

B. Effects of the project on wetlands.

The contention that wetlands will not be significantly affected by the project has been questioned by some of the DEIS commentors. The Forest Service conducted detailed studies of the Cross and Fall Creek wetlands. The Forest Service was assisted by the Fish and Wildlife Service, Colorado Division of Wildlife, and the Army Corps of Engineers in the study. It was found that these wetlands developed in basins and hollows scoured cut of the bedrock by glacial action. Depositional material subsequently deposited in these scoured areas acts as a groundwater reservoir. The saturated conditions necessary for wetland vegetation is provided by precipitation falling directly upon the wetlands

themselves. In addition, the hillsides adjacent to the wetlands provide a considerable amount of water through surface and subsurface runoff. Since much of the wetland area lies outside of the floodplain and sufficient water is available from sources other than the streams, I conclude that the project will not have a significant effect on wetlands. (FEIS Sections 3.1.3, pages 3-8 to 3-10; 4.1.3, pages 4-21 to 4-30)

C. The maintenance of adequate instream flows to protect the environment.

Several comments to the DEIS expressed concern about the depletion of streamflows below the proposed Phase II diversions. The easement authorizing the diversion requires that environmental maintenance flows be provided in all streams affected by diversions. This means that a set amount of water would be provided at all times to protect fisheries, maintain channel stability and enhance visual resources. The Phase II diversion structures will be designed to bypass the minimum flow before diversion takes place. The bypass flow mechanism will be nonadjustable and one that is permanently and unalterably fixed. (FEIS Sections 3.1.2, pages 3-3 to 3-5; 4.1.2, pages 4-3 to 4-6; Appendix E; and Easement Condition No. 23, Exhibit 4, page 8, attached)

D. The correction of impacts resulting from the existing Homestake Phase I Project.

This issue is derived from the concerns of individuals about complete diversion and subsequent drying-up of streams affected by Phase I of the project. Prior to the start of construction on Phase II, the mitigation of impacts resulting from Phase I must be initiated. (See Exhibit 4, Easement Condition No. 22, attached.) A major mitigation action will be provision of instream flows to Sopris, Fancy, French, and East Fork Homestake Creeks. (FEIS Sections 3.1.17, pages 3-25 to 3-27; 4.1.17, pages 4-54 to 4-58)

E. Water planning – the suggestion that the Forest Service should conduct water planning to identify possible water traces or other water supply options which could be alternatives to the proposed projects in the upper Colorado River Basin.

This issue was raised by some individuals commenting on the DEIS. Local governments also submitted comments in this vein and it was raised by several individuals at the House Subcommittee hearing. The Forest Service and other Federal agencies processing applications for land use or other approvals must recognize that the issues involving water development and growth are matters of State and local land use planning. The Forest Service has no jurisdiction or legislative charge to resolve these questions. The Forest Service will not, under the guise of responding to a land use application, attempt to use its offices to redeem State and local planning responsibilities. A Federal environmental

focus of the Homestake Project EIS is on the application submitted by the Cities for a long term use of National Forest System land. The Forest Service will meet its responsibilities to comply with the Federal laws regarding the Cities' application (FEIS Section 1.5.3, pages 1-17, 1-18). We will not attempt to resolve State or local issues so sensitive that those who are responsible appear to avoid addressing them in the hope that, if left alone they will go away or that Forest Service actions will remove the need for action. Once the Federal Government begins to take action on what is rightfully a State and local government responsibility, then the stage is set for continued intervention and erosion of State's rights. The precedent of Federal intervention, once initiated, is hard to reverse. (FEIS Section 1.4, pages 1-11 to 1-15)

III. SPECIAL USE APPLICATION PROCESS AND ENVIRONMENTAL REVIEW

The Special Use Application submitted under the Federal Land Policy and Management Act (FLPMA), as supplemented by materials obtained by the Cities during the NEPA review (FEIS Section 6.1, page 6-1), has been examined and contains the materials required by 36 CFR 251.54(e). After the close of the public comment period on the DEIS, a question was raised by the Vail Valley Consolidated Water District regarding the adequacy of the application of the Cities under 36 CFR 251.54(e). The application process began when the Cities submitted initial materials on June 19, 1981; the FLPMA application

for an easement was submitted on January 12, 1982. Throughout the review of the Cities application, the Forest Service has continually requested and received additional information upon which to base a decision. A list of the materials which have been obtained from the Cities in order to comply with 36 CFR 251.54(e) is attached as Exhibit 8. A complete set of these materials may be reviewed at the White River National Forest Supervisor's Office. The Forest Service will continue to receive information from the Cities on the administration and operation of the Phase II Project.

While the Cities are proceeding with their application to the Forest Service for a right-of-way under FLPMA, the Cities have reserved the right to seek an amendment under 43 CFR 2802 (1979) to their unbuilt 1962 right-of-way issued by the Department of the Interior under 16 USC 524. The Tenth Circuit U.S. Court of Appeals held in *Denver v. Berglund* 695 F.2d 465, 481 (1982) that grants issued under 16 USC 524 could be amended under the Department of the Interior regulations for the 1905 Act even after the effective date of FLPMA, which repealed the 1905 Act. The Cities have written a letter to the Bureau of Land Management (BLM) reserving the right to request an amendment and the BLM has responded (Exhibit 2).

I am making a decision on the Cities FLPMA application, as it has not been withdrawn. The Cities will have sixty days from the receipt of this easement to accept (36 CFR 251.62). As a condition of this FLPMA easement the Cities will be required to relinquish the unbuilt 1962 easement issued under the 1905 Act. If the Cities reject the FLPMA

easement they may apply to BLM for an amendment to their 1962 easement.

The FEIS contains revisions of the Draft Environmental Impact Statement material. These revisions were occasioned by the comments of the public, groups, and Federal, State, and local agencies on the DEIS, and the public meetings held on the DEIS. Additional data or better information which were obtained during the review period have been incorporated into the FEIS (FEIS Section 6.2.1, pages 6-8 to 6-361). The Cities' proposal for land use has not changed; however, as required by NEPA and in response to the public comments on the DEIS, the alternatives have been modified and the discussion of impacts, effects, and features of the proposed action and the alternatives have been expanded.

Comments received during the preparation and review of the DEIS for this proposal suggested that the Forest Service delay its Federal decision regarding the easement application until State water planning has been completed (FEIS Section 6.2, page 6-5). Water adjudication is a matter of State concern and may be a means by which the social and economic growth issues will someday be addressed. It is my view that delay of a decision is a variation of Alternative 1, No. Action (FEIS Section 2.2.1, page 2-15), which denies the Cities' application. The Forest Service Special Use Regulations, 36 CFR 251.54(h) provide for denial of applications when:

1. The proposed use would be inconsistent or incompatible with the purpose(s) for which the National Forest System lands are managed, or with other uses; or

2. The proposed use would not be in the public interest; or
3. The applicant is not qualified; or
4. The use would otherwise be inconsistent with Federal and State laws; or
5. The applicant does not or cannot demonstrate reasonable technical or financial capability.

The Cities are entitled to a timely decision on their application. There is no provision for delaying a decision indefinitely. I have no indication that State water planning will be undertaken, or if undertaken, when it would be completed.

Many commentors have criticized the lack of additional or expanded water trade alternatives. There is an infinite number of such alternatives which could be analyzed; however, there are no proponents or applications for National Forest System land use from any holder of an adjudicated water right to implement any of the water trade alternatives. To delay a decision and study further such remote and speculative proposals would, in my judgment, be unreasonable. Further, such State-wide or similar studies would result in the Forest Service conducting State water resource planning for which there is no authority.

The Forest Service recognizes the primacy of the State of Colorado for administration of water rights and uses within the State. The process of water resource planning is quite properly a matter of State responsibility and should be conducted and settled by the State (FEIS Section 1.2, page 1-6). I am forced into making a decision

that somewhat overlaps State jurisdiction. By approving this specific proposal, piecemeal water development will continue. By denying the Forest Service portion of the proposal, the Cities' opportunity to effectively develop their State-decreed water rights would also be denied. I do not know that the State will ever develop a State-wide water plan. The Forest Service would assist and cooperate in development of a State-wide water plan and would gladly use such a plan if one existed (FEIS, Appendix A, page A-16).

IV. DECISIONS

I have reviewed the Cities' Homestake Phase II Water Diversion Proposal, the alternatives to that proposal, environmental consequences, and public comments. Based on this information, my decision is as follows:

A. Issue a granting document for phased construction over a five to ten year period for Alternative 6, as described in Sections 2.2.6 (page 2-32) and 2.3 (page 2-34) of the FEIS (also see Exhibit 3, attached). The grant is for a 50-year period with a re-entry period of 30 years (as provided in 36 CFR 251.56[b]) and includes stipulations to assure fulfillment of the mitigation measures on National Forest System lands (FEIS Section 2.4.1, pages 2-35 to 2-38 and Exhibits 4 and 5, attached). The grant period of 50 years is based upon the cost recovery period of the facilities and the economic analysis of the project (FEIS Section 4.1.16, page 4-52 and Appendix D).

B. The power distribution line will be buried in the Homestake Road (FDR 703). A permit will be issued to the appropriate power distributor. This is discussed in FEIS Section 2.2.6, page 2-32 and 4.1.9, page 4-40.

C. All activities on National Forest System lands will be conducted in accordance with stipulated mitigation measures (Exhibits 4 and 5, attached). These are identical to those disclosed in Section 2.4.1 (pages 2-35 to 2-38) of the FEIS as applicable on MFS lands, and are incorporated into all authorizing documents. Mitigation measures will be enforced through the grant document and Forest Service regulations (36 CFR 251). The Mitigation measures are the key to the decision to grant the land use. As discussed in the Reasons for the Decision (Section V), the proposed land use would be denied if the mitigation measures (Exhibit 5) were not included. Mitigation measures for non-Federal lands will be specified by the appropriate State or local agencies. A list of potential measures is provided in Section 2.4.2 (page 2-38 and 2-39) of the FEIS.

V. REASONS FOR THE DECISIONS

The bases for my decisions are as follows:

A. The decision is consistent with the Organic Act of 1897, the Multiple Use Sustained Yield Act of 1960, and Title V of the Federal Land Policy and Management Act of 1976 (FLPMA).

1. The White River National Forest was established under the authority of the

Organic Administration Act of 1897 (30 Stat. 34, supplemented and amended; 16 USC 473-478, 479-482, 551), which states, " . . . No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, . . . " and " . . . All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, . . . " Therefore, I conclude that the Homestake Phase II Project is consistent with National Forest purposes (36 CFR 251.54(h)(1).

2. The proposed use is in the public interest. Although there will be an effect on wilderness users and the magnitude of the effects will vary on each wilderness user, the Homestake Phase II project will not significantly affect the increasing wilderness use trend (FEIS Section 4.1.5, pages 4-38 and 4-39). Further, Colorado Springs and Aurora will be permitted to develop their decreed water rights and, therefore, meet their community goals (36 CFR 251.54[h][2]).

3. The applicant is qualified (36 CFR 251.54[h][3]). The Cities' application shows that each City has maintained a water supply system for sometime. The Cities have had previous projects on national Forest System lands. As local governmental bodies, the Cities are

qualified to be holders of a right-of-way under FLPMA.

4. This Project is expected to cost about $90 million. Both Cities have completed more costly projects successfully. The Cities have submitted information showing that they plan to finance the Homestake Phase II Project with revenue bonds and general obligation bonds (FEIS Section 6.2.1, pages 6-125 and 6-133). The bonds will be retired by revenues from the sale of water to present and future users (letters of October 21, 1982, Colorado Springs, and December 13, 1981, Aurora, which are included in the application file).

   The Cities have successfully constructed, operated, and maintained several similar projects including Spinney Mountain (Aurora), Homestake Phase I (Colorado Springs and Aurora), and Rampart Reservoir (Colorado Springs). There has been criticism of the Homestake Phase I Project. The environmental and other problems which arose from Phase I are discussed in the FEIS (Section 3.1.17, pages 3-25 to 3-27). I am requiring correction of these problems and the Cities have shown a willingness to cooperate. (See Exhibit 4, Easement Condition No. 22, attached; FEIS Section 4.1.17, pages 4-54 to 4-58.)

   I find that the Cities have the financial and technical capability to conduct, operate, maintain, and terminate the

proposed land use in accord with 36 CFR 251.54(h)(5).

5. It is required by Section 505 of FLPMA, 43 USC 1765, and Forest Service Special Use Regulations, 36 CFR 251.56(a), that each special use authorization contain:

> " . . . (1) terms and conditions which will (i) carry out the purposes of applicable statutes and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance if those standards are more stringent than applicable Federal standards; and
>
> (2) such terms and conditions as the authorized officer deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the use or adjacent thereto; (iii) protect other lawful users of the lands adjacent to or occupied by such use; (iv) protect lives and property; (v) protect the interests of individuals living in the general

> area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (vi) require siting to cause the least damage to the environment, taking into consideration feasibility and other relevant factors; and (vii) otherwise protect the public interest."

The terms and conditions of this easement (Exhibit 4) were developed through the NEPA process by refining and adding to the initial environmental protection plan submitted by the Cities in their application. The DEIS included mitigation measures for each action alternative and a grant document for the readers to review. The terms and conditions required by FLPMA and imposed in this easement are cross-referenced to the mitigation measures in the FEIS in Exhibit 5. Exhibit 5 also includes citations to the provisions of Section 505 of FLPMA upon which the conditions or stipulations in the easement are based. The request of the Cities to use the National Forest land without the conditions and stipulations of the easement would violate FLPMA and the request would be denied. The compliance with Section 505 of FLPMA satisfies the requirements of NEPA (40 CFR 1505.2[c]). This decision includes all practicable means to avoid or minimize environmental harm.

6. The area necessary for occupancy during and after construction will be as shown on the Final Construction Plans approved by the Forest Supervisor. This area will be limited to the specific ground necessary for operation and administration of the project. The grant document provides for operation and maintenance, along with public safety. In addition, the grant provides mitigation measures on National Forest System lands to assure that there will be no unnecessary damage to the environment (FEIS Section 2.4.1, pages 2-35 to 2-38). Without these mitigation measures the Forest Service would not be assured of environmental protection and unnecessary damage to the environment would occur. Consequently the Forest Service would not issue the grant document under the FLPMA regulations (43 USC 1764, Section 504[a]).

B. It is consistent with the requirement of the National Environmental Policy Act of 1969, to use all practicable means and measures to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans.

C. Compliance with Section 7 of the Endangered Species Act of 1973 (PL 93-205, as amended) is required. A "no jeopardy opinion" has been issued by the Fish and Wildlife Service (FEIS Appendix I). The Cities have agreed to the required action specified

by the Fish and Wildlife Service (FEIS Section 4.1.4, page 4-33; FEIS Appendix I; and Easement Condition 27, herein.)

D. I have reviewed the FEIS with regard to wetlands which would be impacted (FEIS Sections 3.1.3, pages 3-8 to 3-10; 4.1.3, pages 4-21 to 4-30) and Executive Order 11990. The granting of this land use is consistent with Executive Order 11990 because the wetlands on the project area will not be significantly affected by the water diversion. The diversion structures will be located in the steams, temporarily disturbing about six acres, of which about two wetland acres will be lost (FEIS Section 4.1.3, page 4-29). There is no practicable alternative to avoid the disturbance of these six acres. Significant adverse effects will not occur and this action minimizes the loss of wetlands.

E. The proposal is generally inconsistent with the concept and philosophy of wilderness as expressed in the Wilderness Act of 1964. However, it is consistent with the Colorado Wilderness Act of 1980 (PL 96-560) containing the following language concerning the Homestake Phase II Project and the Holy Cross Wilderness:

> " . . . (5) Certain lands in the San Isabel and White River National Forest, Colorado, which comprise approximately one hundred and twenty-six thousand acres, as generally depicted on a map entitled "Holy Cross Wilderness – Proposed," dated November, 1980, and

> which shall be known as the Holy Cross Wilderness: Provided, that no right, or claim of right, to the diversion and use of existing conditional water rights for the Homestake Water Development project by the cities of Aurora and Colorado Springs shall be prejudiced, expanded, diminished, altered, or affected by this Act. Nothing in this act shall be construed to expand, abate, impair, impede, or interfere with the construction, maintenance, or repair of said project, nor the operation thereof, or any exchange or modification of the same agreed to by the cities and the United States acting through any appropriate agency thereof; . . . . "

The Wilderness was established recognizing the Cities' project proposal and it applies exclusively to the Cities. Of the twenty (20) wildernesses established by Public Law 96-560, only the Holy Cross Wilderness designation contained specific wording dealing with a proposed water diversion (FEIS Sections 1.4, page 1-11; 3.1.6, pages 3-14 to 3-16; 4.1.6, pages 4-36 to 4-39). If Congress had not included this language recognizing and protecting the Cities' water rights and the project, then Section 4(d)(4) of the Wilderness Act (16 USC 1133[d][4]) would apply and a Presidential exemption for the project would be required.

F. I do not have any information that indicates there may be a technological breakthrough negating the demand for municipal water supplies forecast by the Cities (FEIS Section 1.3, pages 1-8 to 1-11).

G. Although FSM 1970 requires that " . . . efficiency shall be considered in making decisions. . . . ," (FSM 1970.3, item 3) and a cost analysis was performed (FEIS Section 4.1.16, page 4-52), it was not very helpful in making this decision. The alternatives are substantially different in that they provide different quantities of water to different users. The type of analysis described in FSM 1970.3 does not lend itself to Federal land use authorizations, but is more suited for Federal water resource planning.

VI. ALTERNATIVES CONSIDERED

The alternatives considered in making this decision are described in the FEIS, Section 2.2, pages 2-1 through 2-34 and summarized in Exhibit 6.

Briefly, Alternative 1 is "No Action"; the Homestake Phase II Proposal is not developed. Alternative 2 uses the alignment described in Grant C-013867 which the BLM issued in 1960. Alternative 3 is a combination of a tunnel and pipeline gravity system into Homestake Reservoir. Alternative 4 is establishing a new reservoir in the Upper Valley above Red Cliff. Alternative 5 is a water trade concept involving the Cities and Denver. Alternative 6 is a modified version of the Cities' proposal.

The following discussion highlights the impacts of each alternative and describes the features which were important in the consideration for selection. Sections 2 and 4 of the FEIS discuss the alternatives and the consequences of implementation of each alternative. Exhibit 6, which is attached hereto, is a summary of the consequences identified and discussed in the FEIS. It is noted that the Forest Service has only one application before it at this time – the Cities' proposal represented by Alternative 6.

Alternative 1 – No Action

This alternative causes the least impacts to the local biological and physical environment of the project area and, on that basis, is the environmentally preferable alternative. The "no action" alternative would actually be a denial (see Section II, above) and would force the Cities to obtain the needed water from alternative sources. The cost of water from the alternative sources, such as the condemnation of agricultural water and development of groundwater described in the FEIS (Section 2.1.1, page 2-5), could be higher. Furthermore, the secondary effects on farmlands, agricultural economies, and the holders of rights to groundwater could be severe (FEIS Section 2.1.2, page 2-7). If the "no action" alternative were adopted, the Cities could likely not acquire and develop water resources in time to meet the projected demands for water. Finally, the Forest Service does not have the authority to require the Cities to adopt the non-structural alternatives described in Section 2.1.1 of the FEIS, pages 2-1 through 2-7.

Alternative 2 – 1962 Homestake Phase II Alignment

This alternative is based upon a land use authorized by Grant C-103867 issued on December 29, 1960, and assigned to the Cities on July 31, 1962. The Grant authorized a series of tunnels, open canals, and conduits to divert water from nine locations in the Holy Cross Wilderness. This alternative results in the disturbance of 253 acres of surface area. About 30,000 acre-feet of water could be diverted annually and seven streams could be dried up for portions of each year. There is no provision to require permanent bypass flows in this alternative and as a result, five miles of streams would have inadequate flows to maintain fisheries and other environmental benefits. The implementation of this alternative would adversely affect 220 acres of the Holy Cross Wilderness. About 14 Acres of wetlands would be lost. Alternative 2 is less environmentally preferable than Alternative 6. Because of the adverse effects on wilderness, streamflow, surface area disturbance, and wildlife habitat, Alternative 2 was not selected.

Alternative 3 – Tunnel and Pipeline Systems

This alternative is a combination of tunnels and pipelines. Diversions of water would occur in the Holy Cross Wilderness at eight locations. There would be one diversion outside the Wilderness. Two large pipelines or conduits would be installed in the Wilderness; one 42 inches in

diameter and 21,000 feet in length; the other 54 to 66 inches in diameter and 63,000 feet in length (See FEIS, Section 2.2.3, page 2-19). About 103 acres of surface area would be disturbed, of which 70 acres would be within the Wilderness. Annual water diversion would be 23,900 acre-feet. Bypass flows would be required at all diversions and the streamflow would be adequate for fisheries and other environmental benefits at all times. No stream would be dried up. About 14 acres of wetlands would be lost. Alternative 3 is less environmentally preferable than Alternative 6. Because of the adverse effects on wilderness, surface area disturbance, and wildlife habitat. Alternative 3 was not selected.

Alternative 4 – Upper Valley Reservoir

While Alternative 4 has not been selected, it has some merits. It would provide for west slope storage and it would allow the Cities and others to develop their State-decreed water rights. It would provide for flat water recreational opportunities; however, it would also result in the loss of 290 acres of wetlands. In this alternative, 16 acres of Wilderness, near the boundary, would be adversely affected. Alternative 4 was not selected because it proposes a complex joint venture that does not exist between the decreed water rights holders nor does the Forest Service have an application for such an alternative. I would consider Alternative 4 to be consistent with the laws and regulations governing the use of National Forest System lands. The State of Colorado would be, in my judgment, the logical

governmental body to initiate and plan such a venture.

Alternative 5 – Water Trade

This alternative is conceptual in nature and does not at this time include any specific sites or development proposals. The alternative is included in the analysis to provide a more complete disclosure and to provide some comparisons, even though they are speculative in nature. This alternative would require an exchange of water rights between Aurora, Colorado Springs, and Denver and modification of Green Mountain Reservoir rights (FEIS Section 4.1.2, page 4-15). In Section 2.2.5, page 2-30 of the FEIS, some conceptual facilities are assumed to be required for Alternative 5. These are:

1. A west slope replacement reservoir to be located in the Colorado or Eagle River basins. The capacity of the reservoir could vary depending on the yield of the water rights to be exchanged. No specific reservoir sites have been identified. The 35,000 acre-foot Eagle-Colorado Reservoir site near Wolcott may be a possible location.

2. A pump station(s) at Green Mountain Reservoir and an estimated 21 to 23 miles of pipeline from Green Mountain Reservoir to Dillon Reservoir. The pipeline may be located above ground or below ground depending on the site-specific conditions encountered and would be between 48 inches and 84 inches in diameter, depending upon the volume and delivery schedule of transported water.

3. Approximately 10 to 20 miles of temporary roads would be required for access to the above facilities. The amount of roads could vary depending on the facilities involved in the water trade.

4. An east slope reservoir(s) to store water delivered from the exchange. The size and location of any east slope storage facilities is unknown.

Alternative 5 would have no effect on the Holy Cross Wilderness. Outside the Wilderness, about 1,000 to 2,000 acres of surface disturbance would occur. Annual water diversion of 120,000 acre-feet, of which 38,500 acre-feet would be the Cities', is assumed in the analysis. No streams are presumed to be dried up and adequate streamflows for fisheries and environmental benefits would be provided at points of diversion. Some wetlands would be lost, but no estimate of the amount was made due to the conceptual nature of the alternative. This alternative would require substantially more site-specific information for implementation. State water planning would be a requirement since adverse effects on junior water right holders and entities other than the Cities and Denver could occur. The modification of storage and management of Green Mountain Reservoir would require changes in Federal legislation (FEIS Section 4.1.2, page 4-15). The need for additional information and planning would require additional time and the alternative would not meet the Cities' short-term need for water. In my judgment, Alternative 5, as described here and in the FEIS, is less environmentally preferable than Alternative 6. Because

the Forest Service does not have the authority to require water right trades, and because there is no indication that State water planning will be conducted, Alternative 5 was not selected.

VII. PUBLIC INVOLVEMENT

During the preparation of the Homestake Phase II EIS, the Forest Service issued several public notices and attended or held numerous public meetings dealing with the proposal. Section 6.1.1 (pages 6-1 to 6-5) of the FEIS summarizes the specific public involvement activities. Eight public meetings were held for scoping purposes prior to December 10, 1981.

The following is a summary of public involvement activities during the preparation of the Draft and Final Environmental Impact Statements. All meetings listed were open to the public:

12-10-81 Forest Service provided notification of the Homestake Phase II proposal to the Colorado Division of Planning in compliance with Part II of OMB Circular A-95.

12-30-81 Forest Service mailed EIS scoping document.

01-04-82 Discussed EIS scoping at Eagle County Commissioners meeting.

01-06-82 Discussed EIS scoping at Minturn Town Council meeting.

01-20-82 Discussed Homestake Project at Minturn Town Council meeting.

02-01-82 Public meeting with Red Cliff Town Council.

02-01-82 Public meeting with Lake County Commissioners and Leadville City Council.

02-24-82 Meeting with American Wilderness Alliance in Minturn.

05-21-82 First mailing of DEIS and DEIS Summaries. A total of 350 DEIS's were distributed along with 500 executive summaries.

05-27-82 News articles start, in weekly printed news media, concerning DEIS release and public meetings to be held.

06-04-82 Public meeting in Minturn Middle School, Minturn, Colorado. Estimated attendance – 350 people.

06-07-82 Public meeting at Lake County Commissioners regular meeting, Leadville, Colorado. Estimated attendance – 20 people.

06-09-82 Public meeting at City Administration Building, Colorado Springs, Colorado. Estimated attendance – 96 people.

06-10-82 Public meeting at Municipal Building, Aurora, Colorado. Estimated attendance – 52 people.

06-11-82 Notice of Availability of DEIS was published in the Federal Register.

06-22-82 Public meeting at Avon Town Council regular meeting, Avon, Colorado. Estimated attendance – 20 people.

07-06-82 Public meeting with Town of Vail Council, Vail, Colorado.

07-09-82 Public meeting at Holiday Inn, Frisco, Colorado. Estimated attendance – 220 people.

07-13-82 Open House held at Minturn, Colorado. Attendance – 11 people.

07-14-82 Public meeting with Town of Minturn Council, Minturn, Colorado. Estimated attendance – 15 people.

07-22-82 Public forum for comment held at Battle Mountain High School, Avon, Colorado. Attendance – five people.

07-26-82 Close of written comment period on DEIS.

In addition to the above public activities, there were numerous meetings and contacts with individuals, organizations, and agencies. News media coverage was given in the Eagle, Grand, Summit, and Lake Counties, and the Colorado Springs and Denver areas.

Also, a special public hearing was called on November 12, 1982, by the U.S. House of Representatives Committee on Interior and Insular Affairs, Subcommittee on Public Lands and National Parks. Chairman Seiberling and Representative Kogovsek were present from the Committee. Attendance was estimated at 120 people.

Subsequent to the Subcommittee hearings and at the suggestion of Chairman Seiberling, a meeting was held with the State of Colorado on December 9, 1982, to provide the State an opportunity to review Forest Service proposed changes in the DEIS and responses to comments submitted by the State. On December 29, 1982, the Colorado Division of Wildlife (CDOW) provided their latest input. According to Bill McDonald, Coordinator for the State, the comments from the CDOW would be the only ones submitted as a result of the December 9 meeting.

The Forest Service met with the Environmental Protection Agency (EPA) on December 13, 1982, for the same purpose. On January 4, 1983, John Brink of EPA telephoned the Forest Service with final suggested changes.

In addition to the comments that were received during the public comment period and published in Section 6.2 of the final EIS, we have considered other comments that were received up to the time of printing the FEIS. These comments are paraphrased and referenced to relevant Sections of the FEIS (Exhibit 7).

VIII. IMPLEMENTATION

In order to comply with FSH 1909.15, Section 37.2 (46 FR 57012), ground disturbing activities will not be allowed sooner than 30 days from the date of publication of the Notice of Availability of the FEIS in the Federal Register by EPA. In addition, the following are required: 1) construction plans must be approved by the Forest Service as required by the Easement; 2) all Federal, State, and local requirements for permitting must be met before construction begins; 3) prior to initiation of construction, the Cities must obtain State Water Court approval for changes in points of diversion in accordance with the selected alternative; and 4) the Cities must implement the Phase I streamflow adjustments and have the Phase I improvements in place or initiated, as described in the FEIS, Section 4.1.17, pages 4-54 through 4-58 and Exhibit 4, Easement Condition No. 22, attached.

IX. RIGHT TO ADMINISTRATIVE REVIEW

This decision is subject to appeal pursuant to 36 CFR 211.18 (*Federal Register*, Vol. 48, No. 63, March 31, 1983, pages 13420 to 13426). Notice of appeal must be in writing and submitted to me at 11177 West 8th Avenue, Lakewood, Colorado 80225 within 45 days from the date of this decision. A statement of reasons to support the appeal and any request for oral presentation must be filed within the 45 day period for filing a notice of appeal.

/s/ Craig W. Rupp — 5/16/83
CRAIG W. RUPP — DATE
Regional Forester

EXHIBIT 1[1]

Cooperating Agencies and Permits Required

Cooperating Agencies

The following agencies cooperated in preparation of this document:

The U.S. Environmental Protection Agency (EPA) provided guidance and comments for compliance with its duties in addressing environmental impacts and with review of issuance of 404 Dredge and Fill Permits.

---

[1] Taken from FEIS Sections 1.6.1 and 1.6.2, pages 1-18 through 1-19.

The U.S. Army Corps of Engineers (COE) provided guidance and comments in order to use this document in the review of the Cities' application for a Section 404 Dredge and Fill Permit.

The Fish and Wildlife Service (FWS), U.S. Department of the Interior, provided review comments, guidance, and consultation on threatened and endangered species, and wetlands; and also participated in on-ground review.

Permits or Approvals Required for the Cities' Proposed Project

Four Federal, three State, and three local permits or approvals have been identified for project development alternatives. They are:

Federal

1. An easement from the Forest Service under authority of Federal Land Policy and Management Act Of 1976 (FLPMA), 43 USC 1761-1771 plus 36 CFR 251. This document allows construction and operation of the facilities associated with the project on National Forest lands. The easement would contain terms and conditions to carry out the purpose of FLPMA and minimize damage to environmental values.

2. A 404 Dredge and Fill Permit from the Corps of Engineers (33 CFR 320-329). Section 404 of the Federal Water Pollution Control Act as amended by the Clean Water Act of 1977 (PL 92-500) (33 USC 1251 et. seq.) requires a permit be obtained from the Corps prior to the discharge of any fill material into waters of the United States.

3. Compliance by the Forest Service and COE with requirements of Section 7 of the Endangered Species Act of 1973 (PL 93-205 as amended) by conferring with the Secretary of the Interior on the effects of the Federal action on threatened or endangered species and their habitats. Since consultation has occurred, a "no jeopardy opinion" on the project is required.

4. A RCRA Permit (Resource Conservation and Recovery Act of 1976, PL 94-580) would be required from EPA for transport and disposal of hazardous materials if used during construction.

State

1. Permit to Discharge Wastewater under the Colorado Water Quality Control Act of 1973 (CRS 1973, 25-8-501 through 505) is required from the Colorado Department of Health, Water Quality Control Division. During project construction, water discharged from the tunnels and settling ponds would require a National Pollutant Discharge Elimination System (NPDES) Permit.

2. Under the Colorado Water Quality Act (CRS 1973, 25-8-101 et. seq.) a Section 401 Certificate for Dredge and Fill Operations from Colorado Department of Health, Water Quality Control Division is required. This permit is in conjunction with the Corps of Engineers 404 Permit.

3. The State Historic Preservation Officer must evaluate inventoried sites for significance to

comply with the National Historic Preservation Act of 1966 (PL 89-655) and Executive Order 11593 of 1971.

Local

Eagle County and other Counties advise the Forest Service that various permits are needed. These permits would include:

1. An Eagle County building permit.
2. Permits pursuant to Eagle County's or other Counties' HB-1041 process.
3. A Special Use Permit pursuant to Section 2.06.01(3) of the Eagle County Land Use Regulations.

EXHIBIT 3

Description of Alternative Six[1]

This alternative is developed from the Cities' proposal and would divert water from the Cross Creek and Fall Creek drainages and transport it by underground tunnels to the existing Homestake Reservoir (Figure 2-11). From there it would enter the Cities' existing water delivery system to the east slope. The proposed collection system and facilities are described below.

1. Diversion structures on main, West, and East Cross Creeks, and Fall Creek.

---

[1] From Text of FEIS Section 2.2.6, page 2-32.

2. Approximately eleven (11) miles of underground tunnels connecting the four diversion structures to the existing Phase I pipeline at the Fancy Creek portal.

3. A buried 66-inch gravity pipeline extending 3,000 feet from the tunnel portal at Fancy Creek to a point near the north portal of the Missouri Tunnel providing a capacity to convey the total Cross Creek Tunnel flow to the Missouri Tunnel. The Cross Creek flow would initially be conveyed from Fancy Creek portal to the Missouri Tunnel by the existing Fancy-French gravity conduit; but as additional streams are diverted, the conduit capacity would be exceeded and the additional 66-inch parallel pipeline would be required.

4. A power distribution line adjacent to the Homestake Creek valley.

All four diversion dams would be located within the Holy Cross Wilderness resulting in a total of six (6) acres of direct wilderness disturbance. This alternative would produce about 350,000 cubic yards of tunnel muck if drill and shoot construction methods are used, and about 210,000 cubic yards of muck if boring equipment is utilized.

The estimated average annual water yield for this alternative is 19,600 acre-feet. This alternative would develop only a portion of the Cities' undeveloped Eagle River basin water rights and would not develop those rights decreed to the Eagle-Arkansas project. It is estimated that

about 19,000 acre-feet of decreed water rights would remain undeveloped.

EXHIBIT 4

Easement

(Tunnel, Diversion, Pipeline, etc.)

THIS EASEMENT, dated this 16th day of May, 1983 from the UNITED STATES OF AMERICA, acting by and through the Regional Forester, Forest Service, U.S. Department of Agriculture, hereinafter called "Grantor," to the Cities of Colorado Springs and Aurora, Colorado, hereinafter called "Grantee."

WITNESSETH:

WHEREAS, the Grantee has applied under the Act of October 21, 1976, (90 Stat. 2776; 43 USC 1761), and under the Regulations of the Secretary of Agriculture, 36 CFR 251 (45 FR 38328, June 6, 1980) for a tunnel, pipeline, diversion dams, and service road necessary for the collection and transmission of water on, over, across, under or through certain lands owned by the United States in Eagle County, State of Colorado, and administered by the Forest Service, Department of Agriculture.

NOW THEREFORE, Grantor does hereby grant to Grantee an easement under 36 CFR 251.53(l)(1) for a right of way for the construction, operation, and maintenance

of a tunnel, pipeline, diversion dams, other related facilities, and service road on, over, across, under or through portions of the following described lands of the United States in Eagle County, State of Colorado:

Sixth Principal Meridian – Colorado

T. 6 S., R. 81 W. (unsurveyed)
Sections 29 and 32

T. 7 S., R. 81 W.
Sections 3, 4, 5, 7, 8, 17, 18, 20, 29, 32, and 33
T. 7 S., R. 82 W.
Sections 11 and 12

The area authorized by this easement is limited to improvement areas specified on a plat as submitted in the Design Report dated February 22, 1983. The maximum pipeline and road right-of-way width will be 50 feet. Copies of the above designated plats are on file at the White River National Forest Supervisor's Office, Glenwood Springs.

Authorized improvement areas are more particularly identified as follows:

Cross Creek diversion	0.85 acres
West Cross Creek diversion	0.15 acres
Fall Creek diversion	0.35 acres
East Cross Creek diversion	0.20 acres
Subtotal surface occupied Within Holy Cross Wilderness	1.55 acres
Fancy Creek tunnel portal	0.05 acres
Fancy Creek Access road (1,200 feet long)	1.40 acres
Pipelines: Fancy Creek to Missouri Creek –	
66" diameter pipeline; 3,400 feet long	3.90 acres
72" diameter pipeline; 800 feet long	0.90 acres
Subtotal surface occupied outside Wilderness	6.25 acres
Total surface occupied	7.80 acres

Subsurface improvements are the following tunnels, which have a 10-foot diameter bore:

Beneath Holy Cross Wilderness –	
East Cross Creek Tunnel	9,303 feet
Fall Creek Tunnel	17,178 feet
Cross Creek Tunnel	19,070 feet
Subtotal of tunnels beneath Holy Cross Wilderness 45,551 feet or	10.46 acres
Beneath non-Wilderness land – Cross Creek Tunnel 11,600 feet or	2.66 acres
Subtotal subsurface occupied	13.12 acres
Total of all surface and subsurface occupied	20.92 acres

Upon completion of construction, however, the Grantee shall furnish the Forest Service with four sets of "as constructed" location plats. This easement will then be revised as deemed necessary by the Regional Forester to authorize the continued occupancy and maintenance of the rights-of-way as constructed.

This grant is made subject to the following conditions applicable to Grantee, its agents, contractors, and subcontractors:

1. This grant is issued for a period of 50 years ending December 31, 2033, but is renewable provided Grantee will comply with the then-existing rules and regulations governing the occupancy and use of National Forest lands. If necessary in order to meet changing times and conditions, this grant may be revised after 30 years from the date of issuance.

2. The Grantee will pay to Grantor the sum of $208.00 for the period from the date hereof to December 31, 1983, and thereafter on January 1, will pay the sum of $357.00. The charges for this use may be readjusted, every five years if necessary, to place the charges on a basis commensurate with the value of use authorized by this easement.

3. A late payment charge in addition to the regular fees shall be made for failure to meet the fee payment due date or any of the dates specified for submission of statements required for fee calculations. The late payment charge shall be $15 or an amount calculated by applying the current

rate prescribed by Treasury Fiscal Requirements Manual Bulletins to the overdue amount for each thirty-day period or fraction thereof that the payment is overdue, whichever is greater. If the due date falls on a non-workday, the late payment charge will not apply until the end of the next workday.

4. Upon demand, the Grantee shall pay to the United States such sums as the Grantor shall determine to be required, but not to exceed $40,000 annually, to reimburse the United States for administrative costs incurred directly by the United States in inspection and monitoring the construction, operation, and termination of the facilities pursuant to this easement. This condition shall only apply after such time as the Secretary of Agriculture promulgates regulations for cost recovery.

5. This grant is subject to all outstanding valid rights existing on the date of the grant.

6. This grant shall not be conveyed, or otherwise transferred in whole or in part, without the advance written approval of the Regional Forester.

7. The Regional Forester may take action to suspend, revoke, or terminate this easement: (1) upon abandonment; (2) for noncompliance with any conditions of this grant, provided however, that the Grantee shall have been given written notice of the grounds for such action and reasonable time to cure any noncompliance. Such action will be in accordance with the Rules

of Practice Governing Formal Adjudicatory Proceedings and instituted by the Secretary under 7 CFR 1.130-1.151.

The Forest Supervisor or his designated representative may order immediate temporary suspension of any project activity, when it is deemed necessary to protect public health, safety, or the environment. Within 10 days, if so requested by the Grantee, the Grantor will review the action to affirm, modify, or cancel the temporary suspension.

The Grantee shall also be subject to all laws and regulations which apply to the National Forests and the Holy Cross Wilderness in the construction, operation, and maintenance of the improvements authorized by this Grant. The Forest Service remedies for breach of any condition or term of this Grant shall include all those available under the laws applicable to the National Forests and the Holy Cross Wilderness.

8. Upon abandonment, revocation, or termination of this grant, unless the requirement is waived in writing, the Grantee shall, so far as it is reasonably possible to do so, restore the land to a condition satisfactory to the Grantor.

9. The conditions set forth below shall attach to and run with the land:

The described property and its appurtenant areas and its structures and facilities whether or not on the land therein granted will be operated as part of a municipal

water supply system in full compliance with Title VI of the Civil Rights Act of 1964 and all requirements imposed by or pursuant to the regulations issued thereunder by the Department of Agriculture and in effect on the date of this document to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programs or activities provided thereon; and

The United States shall have the right to judicial enforcement of these conditions not only as to the Grantee, its successors and assigns, but also as to lessees and licensees doing business or extending services under contractual or other arrangements on the land herein conveyed.

In the event of a breach of any of the conditions set forth above, all right, title, and interest in and to the above described property shall, at the option of the Grantor, revert to and become the property of the United States of America, which shall have an immediate right of entry thereon, and the Grantee, its successors or assigns, shall forfeit all right, title, and interest in and to the above described property; provided, however, that the failure of the Grantor to insist in any one or more instances upon complete performance of any of the said conditions shall not be construed as a waiver or a relinquishment of the future performance of any such conditions, but the obligations of the Grantee with respect

to such future performance shall continue in full force and effect. The procedures applicable to the foregoing shall be in accordance with 7 CFR 15, and other pertinent laws and regulations.

10. This grant confers no rights upon the Grantee to the use of water involved; such rights must be obtained under State law.

11. This Grant is issued subject to the provisions of the Boulder Canyon Project Act of December 21, 1928 (45 Stat., 1064), particularly Section 13.

12. The Grantee shall have the structures inspected annually. The inspection shall be made by a qualified engineer to ensure protection to the structures. Repairs shall be made in accordance with recommendations by the inspecting engineer. A qualified engineer is one authorized to practice engineering in the State either by reason of his employment by the State or Federal Government or by registration as provided by law of the State. The engineer shall sign a written report of said inspection. Three copies of each report shall be mailed to the Forest Supervisor of the White River National Forest.

13. The Grantee further agrees that Forest Service Representatives may inspect the structure at any time. If the Forest Service is not satisfied with any safety, operation, maintenance, or physical condition of the structures and appurtenances, upon a finding and written notice thereof, the Grantee shall comply with a request to correct, adjust, or change same.

14. The Grantee shall annually submit for Forest Service approval an Operation and Maintenance Plan. This Plan shall include, but is not limited to, the following:

    a. The Grantee shall take necessary precautions to prevent pollution of, or deterioration of lands, air, or waters which may result from the exercise of the privileges extended by this grant. The Grantee shall be responsible for securing any permits, certificates, licenses, or other forms of approval required to comply with Federal and State standards for public health and safety, environmental protection, siting, construction, operation, or maintenance.

    b. The Grantee shall take such soil and resource conservation and protection measures, including weed control, on the land covered by this grant and which is affected by the construction, maintenance, operation, and repair of the project facilities as the Grantor may request.

    c. The Grantee shall not use chemical materials to control undesirable weedy and herbaceous vegetation, aquatic plants, insects, rodents, fish, and other pests without prior approval of the Grantor.

    d. The Grantee shall protect the scenic aesthetic values and the fish and wildlife habitat values of the area under this easement, and the adjacent land, as far as possible, during construction,

operation, and maintenance of the improvements.

e. The Grantee shall be responsible for the prevention and control of soil erosion and gullying on lands covered by this easement and adjacent thereto, resulting from the operation or maintenance of the authorized use. The Grantee shall so operate and maintain the improvements to avoid the accumulation of excessive heads of water and to avoid encroachment on streams. The Grantee shall revegetate all ground where the soil has been exposed and shall construct and maintain terracing, water bars, lead-off ditches, or other preventive works that may be required to prevent and control erosion within one growing season or as prescribed by the District Ranger.

15. The Grantor, in addition to its other rights not specifically enumerated herein, reserves the right of occupancy and use for itself, its permitees, contractors, and the public without charge and without the consent of the Grantee, to any part of this grant across land of the United States within the exterior boundaries of said National Forest including the right to grant additional easements or permits for compatible purposes on, over, under, or adjacent hereto when not inconsistent with the enjoyment of said grant by the applicant. It is further understood that management of the surface of the grant above the tunnels authorized by this easement shall remain

with the United States as long as such management does not interfere with the Grantee's use of the area.

16. The Grantee shall take reasonable action, both independently and on request of any duly authorized representative of the United States, to prevent and suppress fires on or near the lands to be occupied under this grant, including making available such construction and maintenance forces and equipment as may be reasonably obtainable for the suppression of such fires. Unless the origin or spread of the fire is determined to be caused by the intentional or negligent actions of the Grantee or its agents, the Grantee shall be entitled to payment for such services at those rates then prevailing in the Forest Service for services of a similar character.

17. The Grantee shall be held liable for all injury, loss, or damage, directly or indirectly resulting from or caused by the Grantee's use and occupancy of the area covered by the grant, regardless of whether the Grantee is negligent or otherwise at fault, provided that the maximum liability without fault shall not exceed $500,000 for any one occurance and provided further that the Grantee shall not be liable when such injury, loss, or damage results wholly, or in part, from the negligent act of the United States, or an act of a third party not involving the facilities of the Grantee.

Liability for injury, loss, or damage, in excess of the specified maximum, shall be determined by the laws governing ordinary negligence of the jurisdiction in which the damage or injury occurred.

18. The Grantee shall indemnify the United States for any and all injury, loss, or damage the United States may suffer as a result of claims, demands, losses, or judgments caused by the Grantee's use or occupancy. Grantor shall not compromise or settle any claims under this paragraph without the prior written consent of the Grantee.

19. The Grantee shall replace in kind or assume responsibility for expense of moving and relocation any fences, buildings, or other structures as might be made necessary by this grant and shall build and maintain necessary and suitable crossings for all roads and trails that intersect the works constructed, maintained, or operated under this grant. (FEIS Section 2.4.1, page 2-37)

20. Prior to the start of construction the Grantee will present evidence of relinquishment and termination of U.S.D.I. Easement C-013867 to Grantor.

21. Prior to the start of construction, the Grantee will present evidence of a State Water Court decree for changes in points of diversion from the decreed diversion points to the relocated diversion points, as specified in the letter of September 2, 1982, from Grantees' consulting engineers to Grantor.

22. Prior to the start of construction on Phase II, the following mitigation will be started on the existing Phase I portion of the Homestake project. Work necessary to complete the following Phase I mitigation will continue to be prosecuted after work starts on Phase II and will be completed by no later than the time Phase II is completed.

    a. A hiking trail will be constructed adjacent to Homestake Reservoir, to provide access to upper Homestake Lake. (FEIS Section 4.1.17, page 4-56)

    b. A trailhead will be developed at the access point to the East Fork Homestake Creek trail. This trailhead will provide joint access to the East Fork trail as well as to the trail constructed around Homestake Reservoir. (FEIS Section 2.4.1, page 2-37, Section 4.1.17, page 4-56)

    c. The portion of the Homestake Road accessing the east side of the Homestake Reservoir will be improved, and resurfaced, allowing low clearance vehicles to access the reservoir and the trailhead at East Fork Homestake Creek. The Forest Service and the Cities will equally share maintenance responsibilities for this section of road after construction of Homestake Phase II. (FEIS Section 2.4.1, pages 2-36 and 2-37, Section 4.1.17, page 4-56)

    d. The Missouri Creek trailhead will be relocated and rebuilt to provide centralized access to all trails initiating

near the Missouri Creek area. (FEIS Section 4.1.17, page 4-56)

e. Revegetation will be started on Phase I facilities, including access roads, diversion dams, and pipeline routes, where adequate vegetative cover is lacking. These areas will be reseeded, and if necessary, topsoil and fertilizer will be used. (FEIS Section 4.1.17, page 4-54)

f. The disturbed areas adjacent to existing Phase I diversion structures will be revegetated and stocked with seedling trees. The diversion structures will be modified to be less obtrusive and to blend into natural surroundings. Disturbed stream channels below Phase I diversions will be revegetated and restored to a more natural condition. (FEIS Section 4.1.17, pages 4-54 and 4-58)

g. Instream flow bypasses will be provided on all Phase I streams as follows: (FEIS Section 4.1.17, pages 4-54 through 4-57)

Existing Phase I diversion structures will be modified to ensure that the required bypass flows pass the diversion structures at all times.

Sopris Creek Diversion Dam	2 cfs
Missouri Creek Diversion Dam	3 cfs
Fancy Creek Diversion Dam	1 cfs
French Creek Diversion Dam	1 2/3 cfs
East Fork Homestake Creek Diversion Dam	2 2/3 cfs
Middle Fork Homestake Creek Diversion Dam	6 cfs
Homestake Creek at Gold Park	24 cfs

h. As construction commences on Phase II, the following additional mitigation will be performed on Phase I, and will be completed by the time Phase II is completed.

1) Tunnel muck will be placed as a top priority in upland areas over the existing and proposed conduits between French Creek and the Missouri Tunnel. The muck will then be shaped to designed natural contours, covered with a minimum of four inches of topsoil, and revegetated with native grasses and seedling trees.

2) Tunnel muck will be placed over the diversion conduits spanning Missouri Creek to form a small recreational impoundment.

23. In order to minimize damage to fish and wildlife, and otherwise protect the environment, the following environmental maintenance instream flow bypasses will be required at all times: (FEIS Section 4.1.2, pages 4-3 through 4-5)

West Cross Creek	– 5 cfs
Main Cross Creek	– 4 cfs
East Cross Creek	– 3 cfs
Fall Creek	– 3 cfs

In order to accomplish the environmental maintenace [sic] instream flows, the Grantee will design diversion structures to allow a permanent and unadjustable flow

to bypass the structures to ensure that required environmental maintenance flows are always provided. This diversion structure design will also ensure that required environmental maintenance flows are provided prior to allowing water to enter the diversion pipeline. (FEIS Section 2.4.1, pages 2-35 and Appendix E)

24. The Grantee will remove, as necessary, sediments trapped behind diversion dams through diversion tunnels to approved upland disposal sites outside the Wilderness. (FEIS Section 2.4.1, page 2-37)

25. Prior to the start of construction, the Grantee will develop and implement a Water Quality Maintenance and Monitoring Plan to ensure that project activities or facilities do not cause water quality to violate stream water quality standards established by the State of Colorado. This Plan will be approved by the Forest Service prior to its implementation. The Plan will be updated and revised as necessary every five years. (FEIS Section 2.4.1, page 2-37)

26. The Grantee will relocate the East Cross Creek trail to route visitors around the diversion site prior to the start of construction activities. (FEIS Section 2.4.1, page 2-37)

27. Mitigation of the effects of the project on threatened and endangered species of wildlife will be completed by the Grantee, as specified in Appendix I of the FEIS, prior to the diversion of water.

28. The Grantee will operate diversion structure gates and valves by remote control to minimize the need for travel to the sites, and will design the structures to be as vandal-proof as possible to minimize the need for repair crews to be transported to the site. (FEIS Section 2.4.1, page 2-35)

29. The Grantee will comply with the attached Construction Stage Stipulations consisting of clauses contained on the attached pages numbered 14 through 22, which are hereby made a part of this grant.

IN WITNESS WHEREOF, the Grantor, has executed this easement pursuant to the delegation of authority to the Chief, Forest Service, United States Department of Agriculture, 7 CFR 2.50, and the delegation of authority by the Chief, Forest Service, United States Department of Agriculture, (47 FR 36465, August 20, 1982).

UNITED STATES OF AMERICA

By /s/ Craig W Rupp
Regional Forester, Forest Service,
United States Department of Agriculture

CONSTRUCTION STAGE STIPULATIONS

As referred to in Condition 29 of the Tunnel and Diversion Easement Deed between the United States, acting through the Regional Forester, and the Grantee, the Grantee will carry out the terms of the following Stipulation during the Construction Stage. The Construction Stage begins when construction activities are ready to commence on land administered by the Forest Service and compliance with Easement Conditions Numbers 20, 21, 22, and 23 has been demonstrated to the Forest Service. Construction Stage ends when the Forest Service and the Grantee mutually agree that any work done thereafter will be considered as operation or maintenance, EXCEPT, that the Forest Service reserves the right to reinstate the terms of this Stipulation when the Grantee subsequently submits plans for reconstruction or alteration of the project works covered by the aforesaid easement.

The following terms of this Stipulation apply to the Grantee:

1. CONSTRUCTION PLANS:

   Prior to the start of any construction or reconstruction on the area authorized by this grant, the Grantee shall submit final construction plans and specifications for approval by the Forest Service. A copy of the approved plans will become a part of this easement and will be retained in the office of the Forest Supervisor at Glenwood Springs, Colorado.

2. OPERATING PLAN:

   Prior to beginning construction on the project, the Grantee shall prepare an Operating Plan for the project for approval by the Forest Supervisor. Approval

of the Operating Plan will be based upon requirements deemed necessary by the Forest Supervisor for proper management of the project. The Operating Plan shall include but not be limited to the following:

a. A schedule for the development and construction of all facilities needed for the project. The schedule shall include a list of planned improvements and the scheduled date for completion. The Grantee may accelerate the scheduled date for construction of any improvement authorized, provided the other scheduled priorities are met and that all authorized priority installations are competed to the satisfaction of the Forst [sic] Supervisor prior to the scheduled due date. All required plans and specifications for site improvement and structures included in the construction schedule shall be submitted to the Forest Supervisor at least 45 days before the construction date stipulated in the development schedule.

b. A fire plan that details the fire prevention, presuppression, and suppression measures that will be taken by the Grantee, its employees, contractors, and subcontractors and their employees in all operations during the construction stage. The Grantee shall ensure its contractors comply with all provisions of the fire plan and burning permits required for disposal of flammable materials.

c. Plans for controlling soil erosion on the granted area and adjacent lands during construction, operation, and maintenance of the project. This shall include identification of areas and depth where topsoil will be stripped and stockpiled,

methods to be used to obtain revegetation, and areas to be rip-rapped.

d. Designation of the location and standards of all gates, crossings, cattle guards, fences, roads, campgrounds, habitat improvement work, and other improvements to property owned by the Grantor that will be constructed, relocated, or performed by the Grantee to mitigate impacts on wildlife, livestock, ranchers, recreationists, and other users of the National Forest as required by the Forest Service. The plan shall specify the mutually agreed upon time frame for completing the required work and maintaining the improvements.

e. Precautions to be taken in using explosives.

f. Identification of specific areas to be cleared and methods of disposal of the timber cut including merchantable material and slash.

g. Identification of any construction camp locations and operations within the easement area and dates during which construction activities will occur.

h. Post construction cleanup.

i. Annual schedule of construction activities.

3. QUALIFIED ENGINEER:

It shall be the responsibility of the Grantee to employ a qualified engineer to stake out the project prior to construction, and said engineer shall supervise construction operations and furnish the certification of compliance with the final drawings and specifications. Written copies of each inspection report, including soil compaction and concrete tests, are to be furnished the District Ranger each week

during construction. When the project is completed, the Grantee shall have the qualified engineer make a final inspection of the project in company with the Regional Engineer's representative and submit to the District Ranger a certified statement that the project was constructed in accordance with the approved plans, designs, and specifications.

4. GRANTEE'S CONTRACTORS AND SUBCONTRACTORS:

Grantee will include a copy of the easement conditions and stipulations in any contract awarded for construction of the authorized project; and the Grantee's contractors and subcontractors shall be bound by the conditions and stipulations of the grant.

5. ROW DESIGNATION:

The Grantee shall survey and clearly designate the right-of-way limits prior to commencement of construction or other surface or vegetation disturbing activities. Said marking shall be done utilizing staking, flagging, or some other method that will result in minimal environmental damage, and shall be done at frequent enough intervals to readily identify the exterior limits on the ground. All activities directly or indirectly associated with construction or maintenance of the easements granted herein must be conducted within the limits of the grant.

6. GEOLOGIC INVESTIGATION:

The Grantee will conduct site-specific geologic investigations prior to any construction activity. If hazard areas are identified, modification of project design or development of mitigations, as appropriate, will be required. (FEIS Section 2.4.1, page 2-37)

7. CULTURAL SURVEY:

Cultural and historical survey for areas not already surveyed (see FEIS Section 3.1.14) will be completed on areas where surface disturbance will take place in accordance with 36 CFR 800 and Executive Order 11593. (FEIS Section 2.4.1, page 2-37)

8. EROSION CONTROL:

The Grantee will ensure slope stabilization and prevent soil loss throughout the authorized area by carrying out the following erosion control provisions:

a. Topsoil shall be stripped from construction areas and be deposited in storage piles in approved locations apart from other excavated material. After construction has been completed, and the resulting disturbed areas have been reshaped as required, the stored topsoil shall be evenly spread over exposed subsoil to the extent that may be practicable, and shall be revegetated.

b. All earth cut or fill slopes favorable to revegetation, or other areas on which ground cover is destroyed in the course of construction, will be revegetated to grasses or other suitable vegetation as required by the Forest Service. Seeding or planting will be done at a time of the year, in a manner, and with species which the District Ranger considers offer the best chance of success and will be repeated until such areas are accepted in writing by the District Ranger as satisfactorily revegetated and stabilized. Only native plant species will be used within the Holy Cross Wilderness. (FEIS Section 2.4.1, page 2-36)

9. RESTORATION:

At the conclusion of construction operations, temporary access roads, mobilization and operation areas, parking areas, pipeline easements, diversion sites, dam sites, spoil areas, and other areas scarred by construction will be restored and revegetated in a manner satisfactory to the Forest Service. Construction sites will be restored as nearly as possible to their original condition. Construction scars will be covered with the best available topsoil within the immediate area or with subsoil material from excavated areas, fertilized, and seeded with native grasses and mulched. Seedling trees will be planted in areas that were originally forested. To inhibit erosion and to add organic matter to the soil, chipped tree slash and underbrush will be stockpiled and spread over the restored areas. (FEIS 2.4.1, pages 2-35 and 2-36)

10. ACCESS ROADS/CONSTRUCTION:

Access roads along the pipelines and to tunnel portals will be constructed to planned grades and will be graded and drained to inhibit erosion. No roads will be constructed in the Holy Cross Wilderness. (FEIS Section 2.4.1, page 2-36)

11. TUNNEL MUCK:

Excess tunnel muck not needed for mitigation of Phase I of the Homestake Project will be deposited in approved disposal areas outside the Wilderness, compacted and shaped to designed natural contours, and then covered with a minimum of six inches of topsoil material from excavated areas. The surfaced area will then be fertilized and revegetated as described in 8.b., above. (FEIS Section 2.4.1, page 2-36)

12. VISUAL MANAGEMENT:

In right-of-way surveys and construction (Stipulation 5), the Grantee will selectively remove trees designated by the Forest Service to avoid having a straight line appearance. (FEIS Section 2.4.1, page 2-37)

13. ESTHETICS:

The Grantee will cover all diversion structures except for access hatches, the spillway, and the main water entrance with earth or native material. Native materials will be used for riprap embankments. All new pipelines will be buried, unless Forest Service approves otherwise, for safety or environmental reasons. (FEIS Section 2.4.1, page 2-35)

All exposed structures will be a non-specular color or composed of a material that will blend in with the surrounding natural setting. All exposed concrete will require a color additive. (FEIS Section 2.4.1, page 2-36)

14. WILDLIFE HABITAT:

The Grantee will replace wildlife habitat capacity lost because of inundation or disturbance. Wildlife habitat mitigation will be accomplished by the proponent in the general vicinity of the project, but outside the Wilderness boundary. Required improvements will be coordinated by the Forest Service with the Colorado Division of Wildlife and projected lost habitat capacity will be replaced in locations specified prior to start of project development. (FEIS Section 2.4.1, page 2-35)

15. POWER LINE:

The power line adjacent to the Homestake Road will be buried. (FEIS Section 2.4.1, page 2-37)

16. SOLID WASTE:

Solid wastes will be collected periodically and stored for recycling or buried in landfill sites located outside of the Wilderness, as approved in the Construction Stage Operating Plan (Stipulation 2). After construction is complete, landfill sites will be restored as described in Stipulation 9, Restoration, above. (FEIS Section 2.4.1, page 2-36)

17. WATER POLLUTION:

No waste or by-products shall be discharged to a stream if it contains any substances in concentrations which will result in substantial harm to fish and wildlife, or to human water supplies, or will result in the violation of application water quality standards established by the State.

Storage facilities for material capable of causing water pollution, if accidentally discharged, shall be located outside the Wilderness and in such a place so as to prevent any spillage into water, or channels leading into water, that would result in substantial harm to fish and wildlife or to human water supplies. (FEIS Section 2.4.1, pages 2-36 and 2-37)

18. STREAM PROTECTION:

Construction activities in stream channels will not be allowed between April 15 and July 15. (FEIS Section 2.4.1, page 2-37)

Pollution of streams with turbid runoff from construction areas will be prevented. Construction of temporary sedimentation basins to intercept runoff from construction areas, tunnel drainage, and other turbid water will be required. Plans for runoff control and construction of temporary sediment basins must be submitted to the Forest Service for review and approval prior to their construction. Chemical

treatment facilities and/or sediment basins may be required to maintain water quality. (FEIS Section 2.4.1, page 2-36)

19. FOREST SERVICE INSPECTION:

The Grantee shall allow the Forest Service inspection of the project at any time during construction. To facilitate such inspections the Grantee shall:

a. Make available any construction records, reports, tests, schedules, or other material requested by the Grantor's authorized representative.

b. Allow access to and give such assistance as may be requested by the Forest Service to ascertain that construction is as prescribed in the approved plans and specifications.

c. Make additional tests as the Forest Service may request.

d. In advance of construction, advise the Forest Supervisor or his designated representative of the scheduled performance of significant construction items and of any changes in the construction.

20. GRANTEE REPRESENTATIVE:

Grantee shall designate a representative at the site who may be served written orders or notices during construction respecting matters contained in this grant, and who would have authority to take the required action. The Grantee shall inform the Forest Supervisor, Glenwood Springs, Colorado, in writing of the name and address of such agent. If a substitute agent is appointed, Grantee shall immediately so inform the Forest Supervisor.

21. WILDERNESS ACCESS:

Helicopter access to diversion sites within the Holy Cross Wilderness will be prohibited except for emergency purposes or where approved by the Regional Forester. (FEIS Section 2.4.1, page 2-37)

22. PERFORMANCE BOND:

As a further guarantee of the faithful performance of the provisions of this Stipulation, the Grantee agrees to deliver and maintain a surety bond in the amount of $250,000 prior to starting construction. Prior to undertaking additional construction or alternative work not provided for in the above clauses, or when the improvements are to be removed and area restored, the Grantee shall deliver and maintain a surety bond in the amount set by the Forest Service, which amount shall not be in excess of the estimated loss which the Grantor would suffer upon default in performance of this work. Should the sureties or the bonds delivered under this Stipulation become unsatisfactory to the Forest Service, the Grantee shall, within thirty (30) days of demand, furnish a new bond with surety, solvent and satisfactory to the Forest Service. In lieu of surety bond, the Grantee may deposit into a Federal Depository, as directed by the Forest Service, and maintain therein, cash in the amounts provided for above, or negotiable securities of the Grantee having a market value at time of deposit of not less than the dollar amount provided above.

The Grantee's surety bond will be released, or deposits in lieu of bond will be returned, thirty (30) days after certification by the Forest Service, and upon furnishing by the Grantee of proof satisfactory to the Forest Service that all claims for labor and material on said installations have been paid or

released and satisfied. The Grantee agrees that all moneys deposited under this Stipulation may, upon failure on his part to fulfill all and singular the requirements herein set forth or made a part hereof, be retained by the Grantor to be applied as far as may be to the satisfaction of this obligations assumed hereunder, without prejudice whatever to any other rights and remedies of the Grantor.

23. TRAVEL MANAGEMENT AND DUST CONTROL:

The Grantee will develop and implement, after approval by the Forest Supervisor, a Travel Management Plan that identifies public access roads and provides for public safety, necessary road improvement and maintenance, mitigation of increased traffic effects to wildlife and recreational users, and the protection of structural improvements. (FEIS Section 2.4.1, page 2-38, Section 4.1.13, pages 4-46 and 4-47)

The Grantee will post and maintain warning and traffic regulation signs on Homestake and other service roads in accordance with Eagle County traffic and safety regulations. (FEIS Section 2.4.1, page 2-37)

As part of the Travel Management Plan, the Grantee will develop and implement a Fugitive Dust Control Plan to ensure that project-related vehicular traffic does not cause particulate concentrations to exceed acceptable levels. (FEIS Section 2.4.1, page 2-37)

The Grantee shall spray the roads and staging area with water, Pentaparime, or any approved dust palliative, as directed by the Grantor or its authorized representative, and in conformity with applicable State regulations, to control dust from wind, vehicles, and equipment.

24. FACILITY OPERATION:

The Grantee shall be guided by the following provision for transporting water on National Forest lands during the construction stage: Since construction work for the water transmission will take place over a two to ten year period, transportation of water may continue through the existing facilities and through completed portions of the new water transmission structure, provided the new sections are constructed in accordance with the approved plans and specifications and are accepted by the Forest Supervisor.

25. EMPLOYEE TRANSPORTATION:

The Grantee will convey construction workers to construction sites, by vans, busses, or car pools. (FEIS Section 2.4.1, page 2-37)

Where tunnels are involved, the Grantee will disassemble and move construction equipment and crews to the diversion construction site through the underground tunnels and riser shafts to minimize surface disturbance. (FEIS Section 2.4.1, page 2-35)

26. EMPLOYEE SAFETY:

The Grantee shall carry on all operations in a workmanlike manner, having due regard for the safety of employees; and shall safeguard with fences, barriers, fills, covers, or other effective devices, pits, cuts, and other excavations which otherwise would unduly imperil life, safety, or property of other persons.

27. EXPLOSIVES:

The Grantee shall transport, store, handle, and use explosives and flammable materials in accordance with the Occupational Safety and Health Administration standards including Department of Transportation; Bureau of Alcohol, Tobacco and Firearms;

and Mine Safety and Health Administration regulations; and other applicable State of Colorado requirements. Where necessary, blasting operations will be subject to the use of "blankets" to protect the environmental and/or public safety.

28. ARCHAEOLOGICAL DISCOVERY:

If, during excavation work, items of archaeological or paleontological value are discovered, or a known deposit of such items is disturbed, the Grantee will cease excavation in the area so affected. He will then notify the Forest Service and will not resume excavation until written approval is given.

29. CORNER PROTECTION:

The Grantee shall protect all survey monuments, benchmarks, witness corners, reference and other monuments, and bearing trees against destruction, obliteration, and damage. If any monument or corner is in an area subject to disturbance or destruction, the monument will be referenced by a registered land surveyor in such a manner that it can be replaced within 0.1 foot of its original position and properly recorded in compliance with Colorado Revised Statutes 38-53-101 through 38-53-112 (1973).

30. VIOLATIONS OF OPERATING PLAN OR CONSTRUCTION STAGE STIPULATIONS:

If conditions of the Operating Plan or the Construction Stage Stipulations are violated, the Forest Supervisor or his designated representative may order immediate temporary suspension of any project activity. Corrective action, as required by the Forest Supervisor, may be ordered as deemed necessary.

EXHIBIT 5

Granting Document	Mitigation Measures[1]
Easement Conditions (EC):	
EC 14(d)*	The Grantee shall protect the scenic aesthetic values and the fish and wildlife habitat values of the area under this easement, and the adjacent land, as far as possible, during construction, operation, and maintenance of the improvements. [1,2,5,6,7,9,10][2]
EC 19	The Grantee shall replace in kind or assume responsibility for expense of moving and relocation any fences, buildings, or other structures as might be made necessary by this grant and shall build and maintain necessary and suitable crossings for all roads and trails that intersect the works constructed, maintained, or operated under this grant. (FEIS Section 2.4.1, page 2-37) [1,2,5,6,7,9,10]

*Mitigation measure which was proposed or designed by the Cities as part of their Environment Protection Plan (FEIS, Section 2.4.1, pages 2-35 - 2-38).

[1] Ref. FEIS, Section 2.4.1 pages 2-35 through 2-38.

[2] The numbers following the Mitigation Measures refer to specific provisions of Section 505 of the Federal Land Policy and Management Act (FLPMA), attached, upon which the Mitigation Condition or Stipulation is based.

EC 23 In order to minimize damage to fish and wildlife, and otherwise protect the environment, the following environmental maintenance instream flow bypasses will be required at all times:

West Cross Creek	– 5 cfs
Main Cross Creek	– 4 cfs
East Cross Creek	– 3 cfs
Fall Creek	– 3 cfs

In order to accomplish the environmental maintenance instream flows, the Grantee will design diversion structures to allow a permanent and unadjustable flow to bypass the structures to ensure that required environmental maintenance flows are always provided. This diversion structure design will also ensure that required environmental maintenance flows are provided prior to allowing water to enter the diversion pipeline. (FEIS Section 2.4.1, page 2-35 and Appendix E)

[1,2,6,9,10]

EC 24 The Grantee will remove, as necessary, sediments trapped behind diversion dams through diversion tunnels to approved upland disposal sites outside the Wilderness. (FEIS Section 2.4.1, page 2-37)

[1,2,5,6,9,10]

EC 25 Prior to the start of construction, the Grantee will develop and implement a Water Quality Maintenance and Monitoring Plan to ensure that project activities or facilities do not cause water quality to violate stream water quality

standards established by the State of Colorado. This Plan will be approved by the Forest Supervisor prior to its implementation. The Plan will be updated and revised as necessary every five years. (FEIS Section 2.4.1, page 2-37)

[1,2,3,5,6,7,9,10]

EC 26 The Grantee will relocate the East Cross Creek trail to route visitors around the diversion site prior to the start of construction activities. (FEIS Section 2.4.1, page 2-37)

[1,2,5,6,9,10]

EC 28* The Grantee will operate diversion structure gates and valves by remote control to minimize the need for travel to the sites, and will design the structures to be as vandal-proof as possible to minimize the need for repair crews to be transported to the site. (FEIS Section 2.4.1, page 2-35)

[1,2,5,9,10]

Easement Stipulations (ES):

ES 6 The Grantee will conduct site-specific geologic investigations prior to any construction activity. If hazard areas are identified, modification of project design or development of mitigations, as appropriate, will be required. (FEIS Section 2.4.1, page 2-37)

[1,2,5,6,7,9,10]

ES 7 Cultural and historical survey for areas not already surveyed (see FEIS Section 3.1.14) will be completed on areas where surface disturbance will take place in accordance with 36

CFR 800 and Executive Order 11593. (FEIS Section 2.4.1, page 2-37)

[1,2,5,6,9,10]

ES 9* At the conclusion of construction operations, temporary access roads, mobilization and operation areas, parking areas, pipeline easements, diversion sites, dam sites, spoil areas, and other areas scarred by construction will be restored and revegetated in a manner satisfactory to the Forest Service. Construction sites will be restored as nearly as possible to their original condition. Construction scars will be covered with the best available topsoil within the immediate area or with subsoil material from excavated areas, fertilized, and seeded with native grasses and mulched. Seedling trees will be planted in areas that were originally forested. To inhibit erosion and to add organic matter to the soil, chipped tree slash and underbrush will be stockpiled and spread over the restored areas. (FEIS Section 2.4.1, page 2-35 and 2-36)

[1,2,5,6,9,10]

ES 10* Access roads along the pipelines and to tunnel portals will be constructed to planned grades and will be graded and drained to inhibit erosion. No roads will be constructed in the Holy Cross Wilderness. (FEIS, Section 2.4.1, page 2-36)

[1,2,5,6,9,10]

ES 11* Excess tunnel muck not needed for mitigation of Phase I of the Homestake Project will be deposited in approved disposal areas outside the Wilderness, compacted and shaped to designed natural contours, and then covered

with a minimum of six inches of topsoil material from excavated areas. The surfaced area will then be fertilized and revegetated as described in Construction Stipulation 8.b. (FEIS Section 2.4.1, page 2-36)

[1,2,5,6,9,10]

ES 12 In right-of-way surveys and construction (Stipulation 5), the Grantee will selectively remove trees designated by the Forest Service to avoid having a straight line appearance. (FEIS Section 2.4.1, page 2-37)

[1,2,5,6,9,10]

ES 13* The Grantee will cover all diversion structures except for access hatches, the spillway, and the main water entrance with earth or native material. Native materials will be used for riprap embankments. All new pipelines will be buried, unless Forest Service approves otherwise, for safety or environmental reasons. (FEIS Section 2.4.1, page 2-35)

All exposed structures will be a non-specular color or composed of a material that will blend in with the surrounding natural setting. All exposed concrete will require a color additive. (FEIS Section 2.4.1, page 2-36)

[1,2,9,10]

ES 14 The Grantee will replace wildlife habitat capacity lost because of inundation or disturbance. Wildlife habitat mitigation will be accomplished by the proponent in the general vicinity of the project, but outside the Wilderness boundary. Required improvements will be coordinated by the Forest Service with the Colorado Division of Wildlife and projected

lost habitat capacity will be replaced in locations specified prior to the start of project development. (FEIS Section 2.4.1, page 2-35)

[1,2,9,10]

ES 16* Solid wastes will be collected periodically and stored for recycling or buried in landfill sites located outside of the Wilderness, as approved in the Construction Stage Operating Plan (Stipulation 2). After construction is complete, landfill sites will be restored as described in Easement Stipulation 9, Restoration. (FEIS Section 2.4.1, page 2-36)

[1,2,5,6,9,10]

ES 18 Construction activities in stream channels will not be allowed between April 15 and July 15. (FEIS Section 2.4.1, page 2-37)

[1,2,5,6,9,10]

ES 18* Pollution of streams with turbid runoff from construction areas will be prevented. Construction of temporary sedimentation basins to intercept runoff from construction areas, tunnel drainage, and other turbid water will be required. Plans for runoff control and construction of temporary sediment basins must be submitted to Forest Service for review and approval prior to their construction. Chemical treatment facilities and/or sediment basins may be required to maintain water quality. (FEIS Section 2.4.1, page 2-36)

[1,2,5,6,9,10]

ES 21 Helicopter *access* to diversion sites within the Holy Cross Wilderness will be prohibited except for emergency purposes or where

approved by the Regional Forester. (FEIS Section 2.4.1, page 2-37)

[2,5,6,9,10]

ES 23 The Grantee will develop and implement, after approval by the Forest Supervisor, a Travel Management Plan that identifies public access roads and provides for public safety, necessary road improvement and maintenance, mitigation of increased traffic effects to wildlife and recreational users, and the protection of structural improvements. (FEIS Sections 2.4.1, page 2-38, Section 4.1.13, pages 4-46 and 4-47)

[2,5,6,7,9,10]

ES 23 The Grantee will post and maintain warning and traffic regulation signs on Homestake and other service roads in accordance with Eagle County traffic and safety regulations. (FEIS Section 2.4.1, page 2-37)

[1,2,4,7,9,10]

ES 23 As part of the Travel Management Plan, the Grantee will develop and implement a Fugitive Dust Control Plan to ensure that project-related vehicular traffic does not cause particulate concentrations to exceed acceptable levels. (FEIS Section 2.4.1, page 2-37)

[1,2,4,5,6,7,9,10]

ES 25 The Grantee will convey construction workers to construction sites, by vans, busses, or car pools. (FEIS Section 2.4.1, page 2-37)

[1,2,5,6,7,9,10]

ES 25* Where tunnels are involved, the Grantee will disassemble and move construction equipment and crews to the diversion construction site through the underground tunnels and riser shafts to minimize surface disturbance. (FEIS Section 2.4.1, page 2-35)

[1,2,6,9,10]

Excerpt from Federal Land Policy and Management Act of 1976, Section 505

[1] "(a) . . . (i) carry out the purposes of this Act and rules and regulations issued thereunder;. . . . "

[2] " . . . (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment;. . . . "

[3] " . . . (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and. . . . "

[4] " . . . (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards; and. . . . "

[5] "(b) . . . (i) protect Federal property and economic interests;. . . . "

[6] " . . . (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way;. . . . "

[7] " . . . (iii) protect lives and property;. . . . "

[8] " . . . (iv) protect the interest of individuals living in the general area traversed by the right-of-way who

rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes;. . . . "

[9] " . . . (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and. . . . "

[10] " . . . (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto."

APPENDIX C

Application No. 8122A
Name of Applicant Cities of Aurora and Colorado Springs
Effective Date October 25, 1984
Expiration Date (*if applicable*) September 15, 1999

DEPARTMENT OF THE ARMY PERMIT

Referring to written request dated May 24, 1983 for a permit to:

* * *

[X] Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Clean Water Act (*33 U.S.C. 1344*):

* * *

Cities of Aurora and Colorado Springs, Post Office Box 1103, Number 615, Colorado Springs, Colorado 80947, is hereby authorized by the Secretary of the Army: to discharge fill material, in Cross Creek, West Cross Creek, East Cross Creek, Fall Creek and Missouri Creek at Eagle County, Colorado, in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (*on drawings, give file number or other definite identification marks.*)

"Homestake Phase II Vicinity Map", dated March 4, 1982, illegible, subject to the following conditions:

1. General Conditions:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Clean Water Act (*33 U.S.C. 1344*), the Marine Protection, Research and Sanctuaries Act of 1972 (*P.L. 92-532, 86 Stat. 1052*), or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge during its construction or operation, or any pollutant (*including dredged or fill material*), into waters of the United states, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any

revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

e. That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permittee agrees that he will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall allow the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permittee shall maintain the structure or work authorized herein in good condition and in reasonable accordance with the plans and drawings attached hereto.

i. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges, and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations.

j. That this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein.

k. That this permit may be either modified, suspended or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.7.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be materially false, materially incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

o. That if the activity authorized herein is not completed on or before 15th day of Sept. 1999, (*three years from the date of issuance of this permit unless otherwise specified*) this permit, if not previously revoked or specifically extended, shall automatically expire.

p. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

q. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition p hereof, he must restore the area to a condition satisfactory to the District Engineer.

r. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

* * *

[Maps Omitted In Printing]

s. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

t. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferees subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

u. That if the permittee during prosecution of the work authorized herein, encounters a previously unidentified archaeological or other cultural resources within the area subject to Department of the Army jurisdiction that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the district engineer.

II. Special Conditions: *(Here list conditions relating specifically to the proposed structure or work authorized by this permit):*

a. It is the intent of the District Engineer that the wetlands in the Holy Cross Wilderness Area be preserved. Therefore the applicants shall prevent the loss of wetlands in the Fall and Cross Creek Drainages due to water diversions from the Homestake Phase II Project by insuring that flooded or saturated soil conditions within the root zone are maintained from May through August, except where studies show that such saturated soil conditions exist for a lesser period. The applicants are required

to assure that saturated soil conditions as they now exist, will be maintained during project operation.

b. A plan for preventing or mitigating impacts to the wetlands in the Holy Cross Wilderness Area shall be submitted at least six months before the anticipated start of construction. The plan must be approved by the District Engineer prior to construction of the water diversion project. Any structure or work associated with this mitigation plan shall not cause more than minimal visual intrusion to the wilderness area, and shall not have significant environmental impacts. The plan shall be compatible with U.S. Forest Service monitoring and mitigation plans. The plan shall include pre and post-construction monitoring, an implementation schedule, and a maintenance plan. As a minimum, the plan shall be based on the following needed additional data and studies:

1. Develop two-foot contour interval topographic maps of the wetland areas and plant communities. These maps will provide base data for overbank flooding studies, backwater effects and groundwater table gradients.

2. Establish a minimum of three transects in representative wetland areas, within Fall and Cross Creek drainages. For a one year period along each transect, determine ground water and surface water levels, stream channel cross section(s), and quantify the species and plant community types present. The number of transects, in addition to the minimum number of three, should be a

function of wetland area, the amount of other data available at a give specific wetland, and the need to sample within other plant communities.

3. Take continuous streamflow measurements at entry and exit points on the above mentioned representative wetlands in both Fall Creek and Cross Creek over a one year period. The data produced will facilitate water balances calculations and runoff duration and distribution patterns. (Special conditions continued on next page.)

4. Establish staff gages and take periodic streamflow measurements on the major tributary channels into the wetlands main creeks for a one year period. This data will help to establish if these tributaries are perennial or intermittent, and to quan- titatively [sic] determine volumes of "hillslope runoff" being transmitted through them. Streamflow monitoring shall continue in at least three gaging stations in both Cross Creek and Fall Creek basins.

5. Develop daily flow duration curves for pre-project and post-project conditions at all diversion points over a one year period. Flow-frequency analysis shall also be completed to establish dry and we-year monthly average variations with the effects of future diversions during drought years superimposed on these. It is recommended that the WATBAL hydrologic model be used and that site specific data be used to calibrate it.

6. Continue water table level observations within Reed's Meadow and on representative Fall Creek wetlands for one year to establish a one-year seasonal fluctuations record. These measurements should be made at least once per month, exclusive of heavy snow cover

period. Soil hydraulic conductivity should be examined by field measurements using "on-site" methods.

7. Obtain aerial photographs of the two watersheds, such as those offered by NASA on a monthly basis for the next year and on a semiannual basis in subsequent years. The purpose of this is to establish a permanent record of the existing conditions which can be monitored in the future.

8. Obtain statistically reliable measures of nutrient and detrital levels entering both Fall and Cross Creeks below each representative wetland prior to, during and after the peak runoff, especially where over-the-bank flooding occurs. The objective of this study is to determine the contribution that the representative wetlands make to nutrient and detrital levels for fisheries use both where over-the-bank flooding occurs and where it does not.

The following Special Conditions will be applicable when appropriate:

STRUCTURES IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES:

* * *

MAINTENANCE DREDGING:

* * *

DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES:

a. That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines

established pursuant to Section 404(b) of the Clean Water Act and published in 40 CFR 230;

b. That the discharge will consist of suitable material free from toxic pollutants in toxic amounts.

c. That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution.

DISPOSAL OF DREDGED MATERIAL INTO OCEAN WATERS:

* * *

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

/s/ Harold E. Miskel — October 11, 1984
PERMITTEE — DATE

CITIES OF AURORA and
COLORADO SPRINGS
BY AUTHORITY OF THE
SECRETARY OF THE
ARMY:

/s/ Arthur E. Williams — October 25, 1984
ARTHUR E. WILLIAMS, — DATE
Colonel, Corps of
Engineers
DISTRICT ENGINEER, Sacramento
U.S. ARMY, CORPS OF ENGINEERS

Transferee hereby agrees to comply with the terms and conditions of this permit.

RECORD OF DECISION
APPLICATION NO. 8122A
HOMESTAKE PHASE II

The Permit Decision.

1. Based on my review of the U.S. Forest Service final EIS and our application file, which constitutes our entire administrative record for the application, I am issuing a permit under Section 404 of the Clean Water Act to the Cities of Aurora and Colorado Springs to place fill in waters of the United States as part of their proposed Homestake Phase II project. After weighing all of the information available to me, I believe that with the permit conditions that I am requiring and the easement conditions required by the Forest Service, the Homestake II project is in the public interest.

Alternatives Considered.

2. Alternatives reviewed during the processing of this application were those described in the United States Forest Service EIS plus alternatives submitted by others. The Forest Service alternatives included:

a. Alternative 1, the "no action alternative". The project as proposed by the applicants would not occur. This alternative would represent permit denial by the Corps. It provides a basis for comparing alternatives.

b. Alternative 2, the 1962 Homestake Phase II alignment, which would divert water from nine locations in the Wilderness area using 5 miles of tunnel, and 8.5 miles of open canals, or conduits. Nearly all facilities would be in the wilderness with construction impacts to 220 acres.

c. Alternative 3 a combination of tunnel and pipeline systems. This alternative includes 14 diversion points, nine within the wilderness area, and approximately 87,000 feet of various size pipelines or conduits. For support, roads and powerlines would be needed. Most construction would be in the wilderness area.

d. Alternative 4, the Upper Valley Reservoir, would include construction of the Iron Mountain Reservoir, capacity 100,000 acre-feet. Water would be pumped from the reservoir to a conduit leading to the Homestake Phase I reservoir. Additional storage would be available for west slope interests. This alternative would result in the loss of 290 acres of wetlands.

e. Alternative 5, the conceptual water trade, was based on the water trade proposal made by the Vail Valley Consolidated Water District. It would require a trade of water rights among Aurora, Colorado Springs, and Denver. Green Mountain Reservoir rights and operation would have to be modified and approximately 20 miles of pipeline from Green Mountain Reservoir to Dillon Reservoir would be constructed. Forest Service Alternative 5 differs from the Vail Valley proposal by assuming that: 1) the cities Homestake II and Eagle-Arkansas water would be stored in a lower valley reservoir; 2) an east slope reservoir would be constructed to store water from the exchange; and 3) the Eagle-Piney and East Gore collection systems may not be eliminated.

f. Alternatives eliminated from detailed description. Seven alternatives were studied and eliminated from further study in the EIS. Four of the alternatives included water conservation, ground water utilization, growth

management, and purchase of agricultural water. The applicants have informed us that they are implementing all of these to a degree and will do more as the opportunity arises. They contend that these are supplements to the Homestake project, not alternatives.

The Forest Service also considered and rejected a plan involving a reservoir in the lower Eagle River Basin. The Cities' Phase II water rights, stored in this reservoir, would be pumped and gravity fed through a tunnel under the base range into Ten Mile Creek. From there, the water would be delivered to Aurora through Roberts Tunnel. In exchange, Aurora would give up its Homestake Phase I rights to Colorado Springs. This alternative is similar to the Wolcott Pump-Tunnel proposal below.

Two upper Eagle River Basin alternatives involving tunnels, pipelines and reservoirs, were studied and eliminated from detailed consideration in the EIS. They involved more construction in the wilderness area than the applicant's proposal, and they were similar in feature and impacts to Forest Service Alternatives 3 and 4 that were discussed in detail.

3. In addition to the Forest Service alternatives, I have reviewed the Green Mountain exchange submitted by Vail Valley Consolidated Water District, the Wolcott Pump Tunnel by Jack Holmes, and the Camp Hale Reservoir proposal by Roger Fuerher, and the Environmental Caucus Plan.

4. In the Green Mountain Exchange Plan, pipelines would be constructed to pump water up 1,300 feet from Green Mountain Reservoir to Dillon Reservoir for delivery to Denver and Aurora. A west slope reservoir would

be built to replace the water pumped to Dillon Reservoir. The Homestake Phase II rights and Denver Water Department's Eagle-Piney and East Gore water would be stored in this reservoir to replace the water pumped from the green Mountain Reservoir. Aurora would give up its share of Homestake I water to Colorado Springs for their share of Homestake Phase II water.

5. The Wolcott Pump/Tunnel plan is similar to the lower valley reservoir plan that was eliminated from detailed study by the Forest Service. This plan includes the Wolcott Reservoir on Alkali Creek, storage capacity approximately 350,000 acre-feet, about 30 miles of buried pipeline to send water from the Wolcott site to the Dillon Reservoir. Total pumping lifts for this plan would be over 3,000 feet.

6. The Camp Hale Reservoir plan is a suggested 85,000 acre-foot reservoir on the Camp Hale site in the upper Eagle River Basin. Water from the reservoir would be pumped up about 1,450 feet to Wurts ditch to flow south from there to Turquoise Lake.

7. I have reviewed a Summary of the Environmental Caucus Plan submitted by Jack Holmes for the Holy Cross Wilderness Defense Fund. The Environmental Caucus Plan was proposed by two representatives of the Metropolitan Water Round Table to satisfy future water needs of the Denver Metropolitan area. It is not a specific alternative to the Homestake Phase II project. The plan includes new water projects, storage reservoirs, expansion of existing projects; water exchanges, conservation, and groundwater development.

Comparison of Alternatives.

8. The "no action alternative" is the one that would have the least impact on the biological and physical environment. Therefore, no action would be the environmentally preferred alternative. This alternative, however, would cut off the applicant's access to their water rights and could lead to water supply deficiencies for Colorado Springs and Aurora in the 1990s.

9. All of the alternatives are less preferable than the applicant's proposal for various reasons. The main reasons that they are less preferable are:

a. They are environmentally more damaging because they require construction of one or more large storage reservoirs, they impact more wetlands, or they have greater construction impacts on the wilderness area.

b. They require that the water be pumped instead of delivered through a gravity flow system as in the proposed plan. This pumping would consume large quantities of electrical energy.

10. In addition to the above environmental problems the water trade alternatives have the following institutional constraints:

a. Lack of consenting parties to the exchange. The holders of the applicable water rights have indicated that they are not willing to participate in such an exchange.

b. Congressional approval may be required. Such approval would be needed if it is necessary to reauthorize any federal water projects for exchange purposes.

c. Before an exchange could occur, water rights would have to be readjudicated in State Court.

11. The above list represents the major obstacles to water trade alternatives. In addition to the above concerns and institutional constraints, there are other obstacles such as future permitting requirements, National Environmental Policy Act requirements, modification of water decrees and pacts, and probable litigation by opposing groups. Much time would be required to overcome these obstacles.

12. The Green Mountain Exchange and the Forest Service's Alternative 5, in particular, suffers from nearly all of the above flaws, both environmental and institutional. I must conclude that they are not reasonable alternatives to the Homestake Phase II project. I recognize that the Green Mountain Exchange, as proposed by the Vail Valley Consolidated Water District, would replace other projects along with the Homestake Phase II project, but these other projects are speculative. They have not become proposals as defined in the Council on Environmental Quality's Guidelines, and may never reach that stage.

Consideration of applicable Laws and Policies.

13. After review of the proposed action and its alternatives, I find that this federal action is consistent with the following applicable laws and policies:

a. Section 404 of the Clean Water Act. The project with mitigation complies with the Environmental Protection Agency's Section 404(b) Guidelines.

b. Section 401 of the Clean Water Act, requiring state certification or a waiver of certification. The Colorado Department of Health has issued certification for the Homestake II project.

c. Section 101(g) of the Clean Water Act, which states that the authority of States to allocate water quantities shall not be superseded, abbrogated [sic] or otherwise abridged.

d. The National Environmental Policy Act. I find the final Environmental Impact Statement prepared by the Forest Service to be adequate. Critics of this Environmental Impact Statement have claimed that it is deficient in its coverage of alternatives, cumulative impacts and impacts on wetlands. I find that the EIS covered a wide and adequate range of alternatives and cumulative impacts. Additional alternatives were proposed, but alternatives can continue to be proposed ad infinitum, especially water trade alternatives. These later alternatives do not differ in impacts substantially from those alternatives considered in the Forest Service EIS. The Forest Service considered a complete range of impacts including worst case impacts on wetlands (a 1981 Black and Veatch report is referenced that indicates 240 acres of wetland might be lost). They concluded however, that the worst case would not come to pass, and that actual impacts would be insignificant. Although I do not agree with that conclusion for reasons explained later in this document, I believe that the EIS contains sufficient information to make a decision on this application.

e. The Endangered Species Act. The Fish and Wildlife Service has issued a "no jeopardy opinion" and their

recommendations have been incorporated into the easement conditions by the Forest Service.

f. Fish and Wildlife Coordination Act. The project has been coordinated with both the U.S. Fish and Wildlife Service and the Colorado Division of Wildlife. Their views are contained in the application file.

g. Policies concerning Scenic and Recreational Values. The agency responsible for administering the Holy Cross Wilderness area, the Forest Service has granted an easement for the project. They have determined that such a project normally would not be compatible with the wilderness concept, but the law establishing the Holy Cross Wilderness area specifically stated that the Homestake Water Rights should not be abridged or restrained. Conditions applied to the Forest Service easement and the Section 404 Permit will minimize impacts to the Wilderness area.

h. Policy concerning energy conservation. Selecting a gravity flow delivery system instead of one requiring that large volumes of water be pumped is consistent with national objectives for energy conservation.

Consideration of Mitigation Measures.

14. Review of the mitigation measures in the Forest Service EIS and easement conditions show that nearly all practical means to minimize environmental harm from the Homestake project have been incorporated. Project mitigation also includes measures to mitigate the impacts of the original Homestake Phase I Project. I do have,

however, one important concern remaining, the impact to wetlands of the Holy Cross Wilderness area.

15. During consideration of this application, I have noted that there is considerable disagreement concerning the impacts that this water diversion project may have on wetlands in the Holy Cross Wilderness Area. The Forest Service and the applicants believe that the wetlands will not be impacted by the diversion of water through the Homestake Phase II Project. It is their opinion that there will be enough water to maintain the wetlands from side-slope runoff and other sources. The Holy Cross Wilderness Defense Fund, on the other hand, contends that there is insufficient data to support the Forest Service conclusion. They feel that diverting the peak flows will result in the gradual loss of all wetlands below the diversion points. To help resolve these differences, the Sacramento District engaged Aqua Resources Incorporated (ARI), to study the problem. ARI made field trips to project area, studied the available technical reports met with representative of the project proponents and opponents, and concluded that site specific field data necessary to predict conclusively the impacts to the wetlands was lacking.

16. The Forest Service has made a reasoned decision and their judgment may ultimately prove correct. I believe, however, that due to specific mandates of my authority to protect the waters of the United States, I must take a more conservative approach. I must assume that without mitigating measures the wetlands in the Fall and Cross Creek drainages would be severely degraded by the Homestake II project. I intend that these wetlands be preserved, but I do not wish to unnecessarily prolong the

permitting process or restrict the City's development of their water rights. Therefore, I am issuing the permit with the condition that the applicants gather the appropriate hydrologic field data, recommended by Aqua Resources Incorporated, and design a plan to prevent the loss of wetlands in the Holy Cross Wilderness area. This plan would be coordinated with the same technical experts that reviewed the draft ARI report, and must receive my approval prior to construction of permitted facilities. The plan also must include post construction monitoring for prevention of long-term impacts of the water diversions.

17. To conclude, my findings are summarized as follows:

a. The applicants have a need to increase the water supply for their cities. There has been dissent on the timing of the need for water. The project proponents believe the water will be needed by 1994, or sooner. The opponents, disputing the growth projections in the EIS, say that the need would come much later with improved conservation measures. No one has argued that population growth is not occurring in the two cities. The applicants will need additional water for their expanding populations.

b. The alternatives discussed above are not better than the applicants' proposal with the mitigation required by the Forest Service and the Corps. I was not persuaded by the arguments to the contrary.

c. The Forest Service final EIS is adequate and contains sufficient information to make a reasoned decision.

d. This decision is consistent with applicable laws, regulations, and policies.

e. All practical means to minimize or prevent environmental harm will be implemented.

f. It is in the public interest to issue this permit to Aurora and Colorado Springs with conditions to protect wetlands in the Holy Cross Wilderness area.

Arthur E. Williams
Colonel, Corps of Engineers
District Engineer

~~COE/~~bd
CHAMP /s/ AC
HELM /s/ H
BRUBAKER /s/ B
DENNIS /s/ B
ILLEGIBLE /s/ M
WILLIAMS /s/ AW

Findings of Compliance of Non-Compliance
EPA 404b(1) Guidelines (40 CFR Part 230)
Permit Application No. 8122A

Identify one of the following findings with respect to the proposed discharge of dredged or fill material.

___ The discharge complies with the requirements of the 404b(1) Guidelines.

X The discharge complies with the requirements of the 404b(1) Guidelines with inclusion of appropriate and practicable mitigation measures to minimize pollution or adverse effects to the affected aquatic ecosystem.

___ The discharge fails to comply with the requirements of the 404b(1) Guidelines because:

___ There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, and this alternative does not have other significant adverse environmental consequences; or

___ The proposed discharge will result in significant degradation of the aquatic ecosystem; or

___ The proposed discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem.

Section 404b(1) Evaluation
Considerations Related to the Discharge
of Dredged or Fill Material
Permit Application No. 8122A

1. PHYSICAL SUBSTRATE (bottom material of a waterway or wetland)

a. Is the dredged or fill material similar to the material existing at the site where the material will be placed? Yes

b. Will there be any significant effects in the surrounding area (erosion or lateral displacement) as a result of the change in bottom elevation or contours? No

c. Will the dredged or fill material stay in the area where it would be placed? Yes

d. Is the site where the material would be placed confined to the smallest practicable area? Yes

e. Are there any actions proposed to minimize adverse effects on the physical substrate (containment of fill, bank protection, design features)? Yes, the easement granted by the Forest Service contains stipulations and mitigation measures that will minimize adverse effects on the physical substrate.

2. WATER CIRCULATION, FLUCTUATION, AND SALINITY

a. Will the discharge significantly affect current patterns, circulation, and normal water fluctuations? The discharge will create a diversion structure which will substantially reduce peak flows.

b. Will the discharge significantly affect salinity? No

c. Will the discharge divert or obstruct flow? Yes, the discharge creates fill for a diversion structure.

d. Will the discharge activities destroy or isolate flood plain areas that serve the function of retaining natural high waters or flood waters? No

e. Are there any actions proposed to minimize adverse effects on circulation, fluctuation, or salinity (minimum flows, bypass structures, etc.)? Yes, bypass structures that allow minimum flow are required by the Forest Service.

3. SUSPENDED PARTICULATES/TURBIDITY

a. Will the discharge result in unacceptable levels of turbidity? No

b. Are there any actions proposed to reduce turbidity (turbidity screens, working in the dry, cofferdams, etc.)? Yes, stipulations to Forest Service easement require that turbid runoff from the construction areas will be prevented.

4. CONTAMINANTS

a. Will the discharge result in introduction of contaminants or other materials adversely affecting water quality? No

b. Are there any measures proposed to avoid introduction of contaminants (Using clean material, sealing off any contaminated material, etc.)? Forest Service stipulations require that water pollution must be prevented.

5. AQUATIC ECOSYSTEM AND ORGANISMS

*a. Will the discharge jeopardize the existence or modify the habitat of a threatened or endangered species? No, Section 7 (Endangered Species Act) consultation has been completed with the Fish and Wildlife Service, and measure to protect endangered species has been incorporated intot [sic] the applicant's proposal.

*b. Will the discharge significantly disrupt the food chain including alteration or decrease in diversity of plant and animal species? No

*c. Will the discharge activities significantly inhibit the movement of animals, especially into and out of feeding, spawning, breeding, and nursery areas? No

*d. Will the discharge significantly affect shellfish populations, benthic life, fisheries, spawning cycles, or nursery areas? No

*e. Will the discharge have an adverse impact on wetlands – if so, how many acres? No, permit conditions require the applicant to submit and implement a plan to prevent the loss of wetlands.

*f. Will the disposal have a significant adverse impact on vegetated shallows? No

*g. Will the discharge significantly affect riffle and pool complexes? No, diversion weirs will create small ponds. Impacts will not be significant.

*h. If the discharge involves wetlands, vegetated shallows, or riffle and pool complexes, does the work require direct access or proximity to the water resources inorder [sic] to fulfill its basic purpose? Yes, it is a water diversion structure.

*i. Will the discharge violate water quality or effluent standards? No

j. Are there any measures to reduce or avoid significant impacts to the aquatic ecosystem (restoration or improvement of wetlands, avoiding critical areas, etc.)? Yes, Forest Service stipulations and mitigation measures, and conditions to the Department of the Army permit minimize impacts to the aquatic ecosystem.

6. PROPOSED DISPOSAL SITE

*a. Will the discharge have a significant effect on municipal water supply intakes? No

*b. Will the discharge significantly degrade aesthetic, recreational, or economic values? No, structures will be designed and landscaped for minimum visual intrusion.

*c. Is the proposed discharge site the least environmentally damaging practicable alternative? Yes

*d. Are there any measures to avoid significant effects as a result of disposal (reseeding, revegetation, method of disposal, etc.)? Yes, diversion structure will be revegetated and landscaped.

7. CUMULATIVE EFFECTS

Will the disposal when combined with other existing or future activities have a cumulative effect that would result in a major impairment of the water resources and interfere with the aquatic ecosystem? No

8. SECONDARY EFFECTS ON THE AQUATIC ECOSYSTEM

a. Will the disposal result in fluctuation of water elevations or modifications of stream flows (dams)? Yes, as stated above, peak flows will be reduced.

b. Will the discharge result in significantly increased surface runoff or leaching of undesireable [sic]

---

*Denotes impacts which result in significant degradation to the aquatic ecosystem. Information to be used in Part II, Paragraph 3b.

wastes associated with residential or commercial development? No

c. Are there any measures proposed to avoid or reduce secondary effects on the aquatic ecosystem (minimum flow releases, treatment of runoff etc.)? Yes, minimum flows are required, also, applicant must control runoff.

APPENDIX D

8122A [SEAL] JUL 13 1984

COLORAD DEPARTMENT OF HEALTH

Richard D. Lamm
Governor

Thomas M. Vernon, M.D.
Executive Director

July 9, 1984

Colo. Cert. #1057
County: Eagle

Cities of Aurora and Colorado Springs
ATTN: Mr. Harold Miskel
Chairman, Homestake Stiering [sic] Committee
P.O. Box 1103 #615
Colorado Springs, CO 80947

RE: Section 401 Water Quality Certification

Dear Mr. Miskel:

The Water Quality Control Division has reviewed your application for certification for the activity described below. Provided the plans of operation included in your application are followed and the attached General and Special Conditions (where applicable) are complied with, the Division is reasonably assured that water quality standards and effluent limitations will not be violated by this activity.

Description:

Discharge of fill material into Cross Creek, West Cross Creek, East Cross Creek, Fall Creek and Missouri Creek for construction of diversions and associated structures.

Location:

As delineated in the final environmental impact statement and the 404 public notice.

This certification does not constitute a relinquishment of the Water Quality Control Division's authority as delineated in the "Colorado Water Quality Control Act" or any subsequent alterations or additions thereto, nor does it fulfill or waive any other local, state or federal regulations.

Sincerely,

/s/ Jon Scherschligt, Chief
Jon Scherschligt, Chief
Planning & Standards
Water Quality Control Division

JS:RJH:mds
cc – Jim Chubrilo, D.E., WQCD
Sacramento Corps of Engineers

GENERAL CONDITIONS

A. MANAGEMENT REQUIREMENTS

1. All reasonable steps shall be taken to insure that project designs for the control of erosion and sedimentation and the protection of water quality comply with applicable standards and regulations of appropriate agencies.

2. Permanent erosion and sediment control measures shall be installed at the earliest practicable time consistent with good construction practices. One of the first construction activities shall be the placement of permanent and temporary erosion and sediment control measures around the perimeter of the project or the initial work areas to protect the project, adjacent properties, and water resources.

3. Temporary erosion and sediment control measures shall be coordinated with permanent measures to assure economical, effective, and continuous control throughout the construction phase.

4. Erosion and sediment control measures shall be adequately maintained to perform their intended function during construction of the project.

5. Construction operations is in rivers, streams, lakes, or other bodies of water shall be restricted to:

   (a) areas where channel changes are planned,
   (b) areas which must be entered to construct structures or erosion and sediment control measures and
   (c) areas where waters must be forded occasionally during construction. Frequent fording shall not be permitted; temporary bridges or other structures should be constructed where frequent crossings are necessary.

6. Pollutants used during highway construction or operation and material from sediment traps shall not be stockpiled or disposed in such a manner which makes them readily susceptible to being washed into any watercourse by runoff or high water.

7. The use of chemicals such as soil stabilizers, dust palliatives, sterilants, growth inhibitors, fertilizers, deicing salts, etc., during highway construction and operation should be limited to the best estimate of optimum application rates. All feasible measures shall be taken to avoid

excess application and consequent intrusion of such chemicals.

8. Measures shall be taken to prevent spilled fuels or lubricants from entering the watercourse.

9. Any anticiapted [sic] change in discharge location and/or quantities must be reported by submission of a written notice, prior to the change, to the Colorado Water Quality Control Division. If the change is determined to be significant the notice will be acknowledged and approved or disapproved accordingly.

10. If, for any reason, construction activities result in noncompliance with conditions herein, a description of the cause of noncompliance, the period of noncompliance the anticipated time the noncompliance is expected to continue, and steps being taken to reduce, eliminate, and prevent recurrence of the noncompliance shall be reported in writing to the Colorado Water Quality Control Division with, five (5) days of becoming aware of such condition.

11. Areas suitable for vegetation shall be seeded or revegetated to prevent subsequent soil erosion.

12. Fill material shall be clean, non-polluting materials.

13. Measures shall be taken to prevent the entrance of wet concrete into the watercourse when placed in forms and/or from washing of trucks.

14. Any diversion from or bypass of facilities necessary to maintain compliance with the terms and conditions herein is prohibited, except (i) where unavoidable to prevent loss of life or severe property damage, or (ii) where excessive storm drainage or runoff would damage any facilities

necessary for compliance with limitations and prohibitations herein. The Colorado Water Quality Control Division shall be notified immediately in writing of each such diversion or bypass.

15. Solids, sludges, or other pollutants or dredged material removed in the course of treatment or control of wastewaters shall be disposed in a manner such as to prevent such materials from entering waters of the State.

16. Any discharge to waters of the State other than specifically authorized is prohibited.

17. Dredging or filling in excess of that necessary to complete the project shall not be permitted.

18. The work shall be planned so as to minimize the necessity of subsequent maintenance.

19. Notify owners of potable water supply intakes within the downstream affected zone of the proposed project prior to commencing work.

20. Whenever possible operations shall be conducted during low flow periods.

B. RESPONSIBILITIES

1. Authorized representatives from the Colorado Water Quality Control Division shall be allowed to enter upon the area where the construction activity is taking place for purposes of inspection of management practices and/or noncompliance conditions.

2. In the event of any change in control or ownership of facilities where the construction activity is taking place, the succeeding controller or owner

shall be notified of the existence of the requirements herein by letter, a copy of which shall be forwarded to the Colorado Water Quality Control Division.

3. Except for data determined to be confidential (Section 308 of the Act and Section 506 of the Regulations for the State Permit System), all reports and information prepared and submitted in accordance with the requirements herein shall be available for public inspection at the offices of the Colorado Water Quality Control Division.

   Nothing herein shall preclude the Colorado Water Quality Control Division from initiating action to prevent the owner or controller of the construction activity from continuing such activities which result in violation of any terms and conditions herein.

5. After notice and opportunity for a hearing this authorization may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

   (a) Violations of any terms or conditions herein,
   (b) Obtaining this authorization by misrepresentation or failure to disclose fully all relevant facts, or
   (c) A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

6. This authorization does not convey any property rights in either real or personal property, or any exclusive privileges, nor

does it authorize any injury to private property or any invasion of personal rights, nor any infringement of federal, state, or local laws or regulations.

APPENDIX E

Commissioner GUSTAFSON moved adoption of the following Resolution:

BOARD OF COUNTY COMMISSIONERS

COUNTY OF EAGLE, STATE OF COLORADO

RESOLUTION NO. 88-15

IN RE THE MATTER OF THE APPLICATION
OF THE
CITIES OF COLORADO SPRINGS AND AURORA
HOMESTAKE II WATER DIVERSION PROJECT

DECISION

WHEREAS, the Cities of Colorado Springs and Aurora (hereinafter the "Cities" or the "Applicant") submitted a consolidated application for the construction of the second of four phases of a water diversion project commonly referred to as the Homestake Water Diversion Project; and

WHEREAS, the Homestake Water Diversion Project currently diverts water from Homestake Creek and tributaries in the Homestake Valley. The Phase II development proposal, which is the subject of the Cities' consolidated application, is the second of four phases and would divert waters from the headwaters of Cross Creek and its tributaries and Fall Creek in the Holy Cross Wilderness Area of the White River National Forest. The Phase II proposal is for 57,000 feet of tunnels, 3,000 feet of pipeline and four diversion structures. The diversion of water from the Cross Creek and Fall Creek drainages was originally estimated in the application to amount to

approximately 19,600 acre feet per year (af/yr); the estimated amount increased to approximately 21,000 to 21,500 af/yr during the course of the Applicant's presentation of testimony and evidence concerning the Phase II Project (the "Project"). The potential cumulative diversions from Homestake Phase II and all other undeveloped water rights owned by the Cities in the Eagle River Basin total 36,900 a/f in an average year and 11,050 a/f in a dry year, according to an analysis made by a consulting hydrologist firm for the Cities in conjunction with the filing of their application. This water is to be delivered into the existing Homestake system for subsequent delivery to the Cities of Colorado Springs and Aurora for municipal use. The location of the Project is described on the attached Exhibit A.

WHEREAS, the construction and operation of the Homestake II Water Diversion Project constitutes a designated matter of State interest pursuant to Part 1 of Article 65.1, Title 24, of the Colorado Revised statutes, and the "Guidelines and Regulations for Areas and Activities of State Interest of the County of Eagle, State of Colorado", 1980, as amended, and there is no evidence in the record that the Cities fall within any of the exemptions set forth at § 24-65.1-1-107, C.R.S.; and

WHEREAS, the Board of County Commissioners of the County of Eagle, State of Colorado (hereinafter the "Board"), conducted joint public hearings with the Eagle County Planning Commission on April 20 through April 24, 1987, May 14 through May 16, 1987 and May 18 through May 20, 1987, after publication and notice as required by law, to consider the Cities' application for the following permits:

I. Permit to conduct the following designated activity of State interest: a major extension of an existing water collection system (§ 6.04, Eagle County Land Use Regulations);

II. Permit to conduct the following designated activity of State interest: the efficient utilization of a municipal water project (§ 6.05, Eagle County Land Use regulations);

III. Special Use Permit (§ 2.09, Eagle County Land Use Regulations); and

IV. Certificate of Designation (§ 30-20-101, *et seq.*, C.R.S.).

(the above applications hereinafter collectively referred to as the "Application"); and

WHEREAS, the following persons and entities entered their appearance as parties to, and had an interest in, the proceedings:

Avon Metropolitan District
Town of Avon
Colorado Council of Trout Unlimited
Colorado River Outfitters Association
Western River Guides Association
Division of Wildlife
Eagle County Sheriff
Holy Cross Wilderness Defense Fund
James Franklin Lamont
Red Cliff Water and Sanitation District
Town of Eagle
Town of Gypsum
Town of Minturn
Town of Red Cliff
Town of Vail

Upper Eagle Regional Water Authority
Upper Eagle Valley Sanitation District
Vail Valley Consolidated Water District
Vail Associates, Inc.
Eagle County Historical Society; and

WHEREAS, the hearing concluded on October 30, 1987, and the Planning Commission conducted its public deliberation on November 18, 1987, and, based on all the evidence, exhibits and arguments presented, made its recommendation concerning the Application to the Board of County Commissioners in Eagle County Planning Commission Resolution No. 87-1 dated December 30, 1987; and

WHEREAS, the Board of County Commissioners conducted its public deliberation on January 13 and February 4, 1988; and

WHEREAS, prior to the hearing, the Applicant made several motions *in limine* to prohibit the presentation of evidence concerning: (a) need; (b) availability of alternatives to the proposed Project; (c) cumulative effects of all phases of the Homestake Project; (d) costs; and (e) ownership of water rights; and

WHEREAS, the Board ruled to grant the Applicant's motions regarding need, the availability of alternative projects, ownership of water rights, and cost, and to deny the Applicant's motions regarding cumulative effects; and

WHEREAS, because the Board granted the Applicant's request to prohibit any evidence relating to alternative projects outside the scope of the pending Application, the Board is unable to consider permitting

any alternative to the Project described in the existing permit Application, and for purposes of these findings and decision, the Board has not considered or evaluated any evidence relating to alternatives to the Project described in the pending Application; and

WHEREAS, all evidence submitted by way of an offer of proof which is not admissible pursuant to the Board's rulings on the Applicant's motions *in limine* has not been considered by the Board; and

WHEREAS, the Board has considered all evidence, exhibits, testimony and arguments presented which were not excluded by its ruling on the Cities' motion *in limine*.

FINDINGS

NOW, THEREFORE, based on the evidence admitted at the hearings, the Board of County Commissioners of the County of Eagle, State of Colorado, finds as follows with regard to the portion of the Application submitted by the Cities in accordance with the requirements and criteria set forth at the "Guidelines and Regulations for Areas and Activities of State Interest of the County of Eagle, State of Colorado," which are regulations designed to protect the public health, safety and environment, promulgated pursuant to the authority of § 24-65.1-101, *et seq.*, C.R.S. The "Guidelines and Regulations for Areas and Activities of State Interest of the County of Eagle, State of Colorado," are codified in Chapter 6 of the Eagle County Land Use Regulations, there being no separate environmental code. (All references herein to said Guidelines and Regulations are shown in parentheses.)

I. APPLICATION FOR A PERMIT TO CONDUCT A DESIGNATED ACTIVITY OF STATE INTEREST: A MAJOR EXTENSION OF AN EXISTING WATER COLLECTION SYSTEM (§ 6.04, EAGLE COUNTY LAND USE REGULATIONS).

The Board of County Commissioners finds as follows relative to § 6.04:

1. (6.04.15.o) The evidence shows that the proposed development will significantly deteriorate marshlands or wetlands.

2. (6.04.15.1.o) The Applicant has failed to show that the proposed development will not significantly deteriorate aquatic habitats.

3. (6.04.15.1.o) Evidence presented at the hearing failed to demonstrate that the significant deterioration of the wetlands can be adequately mitigated.

4. (6.04.15.1.o) There will be a significant deterioration in public outdoor recreational areas because of loss in the quality and quantity of the river rafting experience and construction disturbances in the Wilderness Area.

5. (6.04.15.1.o) Evidence presented at the hearing failed to demonstrate that the loss in the quality and quantity of the river rafting experience and the construction disturbances can be adequately mitigated.

6. (6.04.15.1.p) Reduction in stream flows and construction activities in the Wilderness Area will result in a significant degradation of natural scenic characteristics.

7. (6.04.15.1.p) Evidence presented at the hearing failed to demonstrate that the significant degradation of natural scenic characteristics resulting from reduction in stream flows and construction activities in the Wilderness Area can be adequately mitigated.

8. (6.04.15.1.m) The proposed development will further decrease the quality of surface water below acceptable standards because of aggravated exceedances of heavy metals.

9. (6.04.15.1.m) Evidence presented at the hearing failed to demonstrate that the decrease of surface water quality to below acceptable standards because of aggravated exceedances of heavy metals can be adequately mitigated.

10. (6.04.15.1.l) The benefits of the proposed development do not outweigh the losses of natural resources.

11. (6.04.15.1.c) There will be an adverse effect on water rights because water quality is a protected element of a water right, and there will be a reduction in downstream water quality.

12. (6.04.15.1.c) Evidence presented at the hearing failed to demonstrate that the adverse effect on downstream water rights can be adequately mitigated.

13. (6.04.15.1.o) There may be a negative effect on the aquatic environment because of increases in water temperature which cause fish to be subject to disease.

14. (6.04.15.1.o) Evidence presented at the hearing failed to demonstrate that the negative effect on the aquatic environment can be adequately mitigated.

15. (6.04.15.1.p) The proposed development will cause nuisance factors such as increased traffic, dust, fire hazards, and dangers from hazardous chemical contamination, explosives and fuels. The mitigation measures proposed by the Cities fail to adequately satisfy this criterion.

16. (6.04.15.1.q) The proposed development will result in increased costs to the Town of Avon for water treatment. However, the Board finds that such increased costs will not result in an undue financial burden to the residents of the County of Eagle.

17. (6.04.15.1.r) There is no evidence that the proposed development will be subject to risk from earthquakes, floods, fires, snowslides, landslides, avalanches, rockslides or other disasters.

18. (6.04.15.1.t) The construction of the Project will not cause a significant impact on communities within the development area and source development area if construction impacts are mitigated.

19. (6.04.15.1.b) The proposed development conflicts with the Eagle County Master Plan and the Areawide Water Quality Management Plan but these plans are advisory only under this criterion.

20. (6.04.15.1.k) There may be easements required for tunnels through mining claims.

21. The following permit criteria under 6.04.15 do not apply:

(6.04.15.1.a)
(6.04.15.1.e)

(6.04.15.1.f)
(6.04.15.1.g)
(6.04.15.1.h)
(6.04.15.1.i)
(6.04.15.1.j)
(6.04.15.1.s)

II. APPLICATION FOR A PERMIT TO CONDUCT THE FOLLOWING DESIGNATED ACTIVITY OF STATE INTEREST: EFFICIENT UTILIZATION OF A MUNICIPAL WATER PROJECT. (§ 6.05, EAGLE COUNTY LAND USE REGULATIONS).

The Board of County Commissioners finds as follows relative to § 6.05:

1. (6.05.15.g) The evidence shows that the proposed development will significantly deteriorate marshlands or wetlands.

2. (6.05.15.1.g) The Applicant has failed to show that the proposed development will not significantly deteriorate aquatic habitats.

3. (6.05.15.1.g) Evidence presented at the hearing failed to demonstrate that the significant deterioration of the wetlands can be adequately mitigated.

4. (6.05.15.1.g) There will be a significant deterioration in public outdoor recreational areas because of loss in the quality and quantity of the river rafting experience and construction disturbances in the Wilderness Area.

5. (6.05.15.1.g) Evidence presented at the hearing failed to demonstrate that the loss in the

quality and quantity of the river rafting experience and the construction disturbances can be adequately mitigated.

6. (6.05.15.1.f) The proposed development will further decrease the quality of surface water below acceptable standards because of aggravated exceedances of heavy metals.

7. (6.05.15.1.f) Evidence presented at the hearing failed to demonstrate that the decrease of surface water quality to below acceptable standards because of aggravated exceedances of heavy metals can be adequately mitigated.

8. (6.05.15.1.g) There may be a negative effect on the aquatic environment because of increases in water temperature which cause fish to be subject to disease.

9. (6.05.15.1.g) Evidence presented at the hearing failed to demonstrate that the negative effect on the aquatic environment can be adequately mitigated.

10. (6.05.15.1.d) The U.S. Forest Service easement restrictions, Corps of Engineers permit requirements, and City construction management techniques contain provisions to ensure that construction of the water Project will not contaminate surface water resources.

11. (6.05.15.1.h) No salinity and advanced wastewater treatment offset plans have been required.

12. (6.05.15.1.i) The construction of the Project will not cause a significant impact to communities within the development area and source development area if construction impacts are mitigated.

13. The record indicates deficiencies in the Environmental Impact Statement.

14. (6.05.15.1.b) The proposed development conflicts with the Eagle County Master Plan and the Areawide Water Quality Management Plan but those plans are advisory only under this criterion.

15. The following permit criteria under 6.05.15 do not apply:

(6.05.15.1.a)
(6.05.15.1.c)
(6.05.15.1.e)

III. SPECIAL USE PERMIT (§ 2.09, EAGLE COUNTY LAND USE REGULATIONS).

A. Section 2.09.02.13, Eagle County Land Use Regulations.

With regard to the Special Use Permit, the Board of County Commissioners incorporates all relevant findings of fact under Sections I and II of this Resolution, "Guidelines and Regulations for Areas and Activities of State Interest", as more fully set forth hereinabove, and, more specifically, finds as follows:

1. (2.09.02.13.f) There will be an adverse effect to private property owners.

2. (2.09.02.13.f) Evidence presented at the hearing failed to demonstrate that the adverse effect to property owners can be adequately mitigated.

3. (2.09.02.13.e) The Project may adversely affect fish, wildlife or migratory ranges.

4. (2.09.02.13.e) Evidence presented at the hearing failed to demonstrate that the adverse effect on fish, wildlife or migratory ranges can be adequately mitigated.

5. (2.09.02.13.b) There is a sufficient supply of electrical energy to serve the Project.

6. (2.09.02.13.c) The Project will be built in a safe and prudent manner.

7. (2.09.02.13.d) The Project will utilize the minimum amount of private land.

8. The following criterion does not apply to the proposed Project:

§ 2.09.13.a

B. Section 2.09.04, Eagle County Land Use Regulations.

1. (2.09.04.1.a) The Project is not compatible with other existing uses.

2. (2.09.04.1.b) For purposes of this Application, "the neighborhood" is the Wilderness Area and adjacent lands. As such, there will be an overall negative effect on the character of the neighborhood.

3. (2.09.04.1.c) There is adequate access.

4. (2.04.04.1d) Proper water and sanitation facilities will be supplied by the Applicant.

IV. CERTIFICATE OF DESIGNATION (§ 30-20-101, *et seq.*, C.R.S.)

1. The proposed disposal site does not conform with Eagle County's comprehensive

land use plan, being the Eagle County Master Plan, and is specifically in contravention of § 4 ("Environment"), § 6 ("Recreation"), § 8 ("Water Use and Diversion"), and § 10 ("Public Lands"), Eagle County Master Plan, § 1.03, Eagle County Land Use Regulations.

2. The disposal site is not compatible with surrounding property.

3. The disposal site is accessible.

4. The Applicant has the ability to comply with Department of Health requirements.

DECISION

The Applicant, having failed to satisfy the criteria set forth at §§ 6.04.15.1 and 6.05.15.1, Eagle County Land Use Regulations, as described above,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, ACTING IN ITS CAPACITY AS THE EAGLE COUNTY PERMIT AUTHORITY:

THAT the Application submitted by the Cities of Colorado Springs and Aurora for the following designated activities of State interest be denied:

A. Major extension of an existing water collection system (§ 6.04); and

B. Efficient utilization of a municipal water project (§ 6.05).

BE IT FURTHER RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, that the Board hereby denies the Cities' Application for a Special Use Permit for the Homestake II Water Diversion Project, the Applicant having failed to satisfy the criteria of § 2.09, Eagle County Land Use Regulations.

BE IT FURTHER RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, that the application submitted by the Cities for a Certificate of Designation be and is hereby denied, the Applicant having failed to meet the requirements of § 30-20-104, C.R.S.

The Board finds, determines and declares that this Resolution is in the best interests of the health, safety and welfare of the County of Eagle, State of Colorado.

MOVED, READ AND ADOPTED by the Board of County Commissioners of the County of Eagle, State of Colorado, at its regular meeting held the 22nd day of February, 1988.

(Seal)
Illegible:

By: /s/ Johnette Phillips
Clerk of the Board of
County Commissioners

COUNTY OF EAGLE, STATE OF COLORADO, By and Through Its BOARD OF COUNTY COMMISSIONERS

By: /s/ George A. Gates
George A. Gates
Chairman

/s/ Donald H. Welch
Donald H. Welch
Commissioner

/s/ Richard L. Gustafson
Richard L. Gustafson
Commissioner

Commissioner Welch seconded adoption of the foregoing resolution. The roll having been called, the vote was as follows:

Commissioner George A. Gates	Aye
Commissioner Donald H. Welch	Aye
Commissioner Richard L. Gustafson	Aye

This Resolution passed by unanimous vote of the Board of County Commissioners of the County of Eagle, State of Colorado.

(2)

Supreme Court, U.S.
FILED

No. 95 428 SEP 5 - 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME II, Pages 157a to 319a

JOHN M. DINGESS
DUNCAN, OSTRANDER, VARNELL & DINGESS, P.C.
7800 East Union Avenue
Suite 200
Denver, CO 80237

GREGORY L. JOHNSON
Assistant City Attorney, Utilities
30 S. Nevada, Suite 601
Colorado Springs, CO 80903

MARK T. PIFHER*
JONATHAN C. DEHMLOW
ANDERSON, GIANUNZIO, DUDE, PIFHER & LEBEL, P.C.
104 S. Cascade Avenue
Suite 204
Colorado Springs, CO 80903
(719) 632-3545

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

166 pp

INDEX TO APPENDICES

VOLUME I

Appendix A: The decision of the Colorado Court of Appeals reported at 895 P.2d 1105 (1994). App. 1a-33a.

Appendix B: Relevant Portions of the FLPMA permit issued for the Homestake Water Project ("Project") by the United States Forest Service. App. 34a-107a.

Appendix C: Relevant portions of the Section 404 permit issued for the Project by the U.S. Army Corps of Engineers. App. 108a-134a.

Appendix D: The decision of the Colorado Water Quality Control Division certifying that the Project met all applicable state water quality requirements. App. 135a-141a.

Appendix E: The resolution of the Eagle County Board of County Commissioners ("County"), dated February 22, 1988, denying the local land use permits for the Project. App. 142a-156a.

VOLUME II

Appendix F: The resolution of the Eagle County Board of County Commissioners ("County"), dated December 17, 1991, denying the local land use permits for the Project. App. 157a-161a.

Appendix G: The order of the Eagle County District Court dated July 22, 1988, dismissing for lack of standing the claims of the cities brought under the Fifth and Fourteenth

Amendments to the United States Constitution. App. 162a-167a.

Appendix H: The order of the Eagle County District Court dated July 22, 1988, dismissing for lack of standing the claims of the cities brought under the Fifth and Fourteenth Amendments to the United States Constitution. App. 168a-172a.

Appendix I: The initial decision of the Eagle County District Court remanding the case to the Board of County Commissioners. App. 173a-191a.

Appendix J: The decision of the Eagle County District Court finding that the County had denied the cities' due process and acted in an arbitrary and capricious manner in denying the requested permits. App. 192a-206a.

Appendix K: The order of the Eagle County District Court vacating that portion of its prior decision which had required the County to issue the permits. App. 207a-212a.

Appendix L: The Colorado Court of Appeals decision denying the cities Petition for Rehearing. App. 213a.

Appendix M: The Colorado Supreme Court decision denying the cities' Petition for Writ of Certiorari. App. 214a-216a.

Appendix N: Relevant portions of the pleadings and briefs below indicating the manner in which the federal questions were raised App. 217a-269a.

Appendix O: Relevant provisions of the Colorado Land Use Act, C.R.S. §§ 24-65.1-101-502 (1988) are attached as App. 270a-279a.

Appendix P: Relevant provisions of the Eagle County land use regulations promulgated pursuant to C.R.S. § 24-65.1-101-502 (1988) are attached as App. 280a-295a.

Appendix Q: Relevant provisions of the Federal Land Policy Management Act, 43 U.S.C. § 1700-1784 (1986), are attached as App. 296a-300a.

Appendix R: Relevant provisions of the National Forest Management Act, 16 U.S.C. §§ 472a, 476 note, 500, 513, 515, 516, 518, 521b, 528 note, 576b, 581h, 594-2 note, 1600 note, 1600-1614 (1985), are attached as App. 301a-303a.

Appendix S: Relevant provisions of the Organic Act of 1897, 16 U.S.C. §§ 475-481 (1985), are attached as App. 304a-305a.

Appendix T: Relevant provisions of the Multiple Use and Sustained Yield Act, 16 U.S.C. §§ 528-531 (1985), are attached as App. 306a-307a.

Appendix U: The text of the Property Clause of the United States Constitution, art. IV, § 3, cl. 2, is set forth at App. 308a.

Appendix V: The text of the Fifth and Fourteenth Amendments to the United States Constitution are attached as App. 309a-311a.

Appendix W: The text of the Supremacy Clause of the United States Constitution, art. VI, cl. 2, is set forth at App. 312a.

Appendix X: Relevant portions of P.L. 96-560, 94 Stat. 3266 (1980) are attached as App. 313a.

Appendix Y: Relevant portions of the Code of Federal Regulations, 1983 edition, governing the use of federal lands, 36 C.F.R. Part 200 through 299, are set forth at App. 314a-318a.

Appendix Z: Map of Homestake Delivery System is attached as App. 319a.

APPENDIX F

Commissioner GUSTAFSON moved adoption of the following Resolution:

BOARD OF COUNTY COMMISSIONERS
COUNTY OF EAGLE, STATE OF COLORADO

RESOLUTION NO. 91-104

REGARDING THE ORDER REMANDING PERMIT APPLICATION CONSIDERATION
HOMESTAKE WATER DIVERSION PROJECT, PHASE II

WHEREAS, the Cities of Colorado Springs and Aurora (hereinafter the "Cities" or the "Applicant") submitted a consolidated application for the construction of the second of four phases of a water diversion project commonly referred to as the Homestake Water Diversion Project; and

WHEREAS, after public hearing, said consolidated application was denied by the Eagle County Board of County Commissioners (the "Board") pursuant Resolution 88-15; and

WHEREAS, said denial is the subject of an appeal under C.R.C.P. 106 to the Eagle County District Court, Case No. 88 CV 142; and

WHEREAS, the Court received cross motions for Summary Judgment; and

WHEREAS, on July 2, 1991, the Eagle County District Court, among other rulings, ordered the applications for a Permit for a Major Extension of a Water Project, for a Permit for Efficient Utilization of Municipal Water Project, and for the Special Use Permit, remanded to the

Eagle County Board of Commissioners for reconsideration in conformance with the Court's written order of that date; and

WHEREAS, the Court determined that any reliance upon certain findings of fact made by the Board under 6.04.15.1.p, 6.04.15.1.1, 6.04.15.1.b, 6.05.15.1.b of the Eagle County administrative regulations, was improper; and

WHEREAS, with regard to the application for a Special Use Permit, the Court determined that any reliance upon certain findings of fact made by the Board under the Special Use Permit criteria 2.09.02.13.f, 2.09.04.1.a, and 2.09.04.1.b, was improper; and

WHEREAS, upon proper notice, the Board held hearings pursuant to said remand on October 21, 1991 and November 25, 1991; and

WHEREAS, the Cities moved for the submission of and inclusion of certain federal agency documents into the record of the decision; and

WHEREAS, the Board allowed and received legal arguments by the parties regarding whether the criteria for approval, as limited by the Court's July 2, 1991 order, were satisfactorily met by the evidence and testimony presented with the application; and

WHEREAS, the Board deliberated upon the issue of whether the criteria for approval, as limited by the Court's July 2, 1991, order, were satisfactorily met by the evidence and testimony presented with the application.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO:

THAT, the record of testimony and evidence used in the consideration of the application is closed and shall not be reopened.

THAT, the Cities' motion for the submission of and inclusion of certain federal agency documents be denied.

THAT, with regard to the application for a Permit for a Major Extension of a Water Project, Section 6.04.15.2 of Eagle County's administrative regulation entitled "Major Extensions of Existing Domestic Water and Sewage Treatment Systems" states that "(t)he permit shall be denied if the applicant fails to satisfy all the criteria outlined in Subsection 6.04.15.1."

THAT, with regard to the application for a Permit for Efficient Utilization of Municipal Water Project, Section 6.05.15.2 states that "(t)he permit shall be denied if the applicant fails to satisfy all the criteria outlined [within 6.05.15.1]."

THAT, in light of the requirements of Sections 6.04.15.2 and 6.05.15.2 of the administrative regulations, and the remaining finding of fact within Sections I and II of the Findings of Fact in the Resolution 88-15, the Board hereby reaffirms its denial of the application of the Cities for the following designated activities of state interest:

A. Major extension of an existing water collection system (Section 6.04); and

B. Efficient utilization of a municipal water project (Section 6.05).

THAT, there remain certain critical findings listed within Section III of the Findings of Fact in the Resolution 88-15, specifically:

"3. (2.09.02.13.e) The Project may adversely affect fish, wildlife or migratory ranges.

4. (2.09.02.13.e) Evidence presented at the hearing failed to demonstrate that the adverse effects on fish, wildlife or migratory ranges can be adequately mitigated."

THAT, in light of the remaining critical findings of fact within Section III of the Findings of Fact in the Resolution 88-15, the Board hereby reaffirms its determination that the Applicant has failed to satisfy the criteria of Section 2.09 and therefore reaffirms its denial of the application of the Cities for a Special Use Permit.

THAT, this resolution and the related deliberations have been undertaken, notwithstanding any objections the Board may have to the Court's ruling as to the authority of the Board to consider, regulate, and deny this application, in an effort to comply with the remand of the Court. The Board reserves all rights of appeal and shall not be estopped by the passage of this resolution from arguing on appeal its authority in excess of the limits placed upon it under the remand.

The Board finds, determines and declares that this Resolution is in the best interests of the health, safety and welfare of the County of Eagle, State of Colorado.

MOVED, READ AND ADOPTED by the Board of County Commissioners of the County of Eagle, State of Colorado, at its regular meeting held the 17th day of December 1991.

[seal]

/s/ Johnette Phillips
Clerk to the Board
of County
Commissioners

COUNTY OF EAGLE,
STATE OF COLORADO,
By and Through Its
BOARD OF COUNTY
COMMISSIONERS

By: /s/ George A. Gates
George A. Gates,
Chairman

/s/ Richard L
Gustafson
Richard L.
Gustafson,
Commissioner

/s/ Donald H. Welch
Donald H. Welch,
Commissioner

Commissioner ___ seconded adoption of the foregoing resolution. The roll having been called, the vote was as follows:

Commissioner George A. Gates ___
Commissioner Richard L. Gustafson ___
Commissioner Donald H. Welch ___

This Resolution passed by ___ vote of the Board of County Commissioners of the County of Eagle, State of Colorado.

APPENDIX G

DISTRICT COURT, COUNTY OF EAGLE, STATE OF COLORADO
Civil Action No. 88 CV 142

ORDER

CITY OF COLORADO SPRINGS and CITY OF AURORA, Colorado Municipal Corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under Section 24-65.1-101, *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;

DIVISION OF WILDLIFE, STATE OF COLORADO;
EAGLE COUNTY SHERIFF, in his official capacity;
HOLY CROSS WILDERNESS DEFENSE FUND;
JAMES FRANKLIN LAMONT;
RED CLIFF WATER AND SANITATION DISTRICT;
TOWN OF EAGLE, COLORADO;
TOWN OF GYPSUM, COLORADO'
TOWN OF MINTURN, COLORADO;
TOWN OF RED CLIFF, COLORADO;
TOWN OF VAIL, COLORADO;
UPPER EAGLE REGIONAL WATER AUTHORITY;
UPPER EAGLE VALLEY SANITATION DISTRICT;
VAIL VALLEY CONSOLIDATED WATER DISTRICT;
VAIL ASSOCIATES, INC.; and
EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

THE COURT, having considered the Motion to Dismiss Plaintiffs' Sixth, Twelfth and Thirteenth claims filed by Defendants Board of County Commissioners of the County of Eagle; George A. Gates, Donald H. Welch, and Richard L. Gustafson, in their official capacities as individual members of said Board; The Board of County Commissioners of the County of Eagle, in its capacity as the permitting authority under Section 24-65.1-101 *et seq.*, C.R.S.; The Eagle County Planning Commission; Charles Ridgway, David Slemon, Dennis Gelvin, and Donald

Price, in their official capacities as individual members of said Commission; and The County of Eagle, hereinafter collectively referred to as "Eagle County" or "Defendants", and the Response and Reply thereto, along with the pleadings and exhibits appended to these documents,

AND BEING fully advised in the premises, enters the following findings and Order:

1. Defendants move the Court to dismiss Plaintiffs' (the Cities') Sixth, Twelfth and Thirteenth claims for relief wherein Plaintiffs, municipal corporations of the State of Colorado, allege that they have been denied due process by Eagle County in contravention of the Fifth and Fourteenth amendments of the United States Constitution. Eagle County argues the following:

a. Plaintiffs lack standing to assert their Sixth and Twelfth clams [sic] for relief because municipalities are not afforded due process protection under the United States Constitution; and

b. Plaintiffs lack standing to assert their Thirteenth claim for relief because municipalities are not afforded statutory protection under 42 U.S.C. 1983.

2. Plaintiffs respond arguing that:

a. Plaintiffs have standing to assert their Sixth and Twelfth claims as home rule municipalities in their capacity as owners of certain decreed conditional water rights;

b. The "per se" exclusionary rule on standing, as developed by the federal courts, should not apply, and does not apply to Colorado home rule municipalities;

c. Colorado courts have found standing to exist under the United States and Colorado Constitutions when considering procedural due process issues;

d. Plaintiffs have standing in their proprietary capacity;

e. There exists a basis for Plaintiffs' Sixth Claim outside of the Federal and State Constitutions; and

f. Plaintiffs have standing to assert their Thirteenth Claim under 42 USC 1983.

3. Defendants reply they are not moving to dismiss all of Plaintiffs' claims, and agree the Cities have standing to bring their action under Rule 106(a)(4) or Rule 57. Defendants argue the Colorado Supreme Court's recent decision in *Orchard City v. Delta County Commissioners*, 751 P.2d 1003 (Colo. 1988) is dispositive of the issues raised, and the governmental/proprietary distinction has never been recognized in the context of Fourteenth Amendment rights. *See City of Trenton v. State of New Jersey*, 262 U.S. 182 (1923).

4. Plaintiffs' Sixth, Twelfth and Thirteenth Claims for Relief are summarized as follows:

a. Sixth Claim – Seeks a declaratory judgment that the regulations adopted by the Board of County Commissioners are legally insufficient and vague as to deny Plaintiffs due process under the Fifth and Fourteenth Amendments of the U.S. Constitution and Article II, Section 25 of the Colorado Constitution;

b. Twelfth Claim – Seeks a declaratory judgment that the findings and conclusions as set forth in the Board's Resolution No. 88-15 are without factual support

in the record; that Plaintiffs were not afforded the right of cross examination and rebuttal as to all evidence considered by the Board; that the Board was impermissibly biased against Plaintiffs and the project; and that the Board applied an unduly oppressive criteria to the permitting of the project, all of which denied Plaintiffs due process in the hearing process; and

c. Thirteenth Claim – Seeks an injunction due to Defendants' arbitrary denial of Plaintiffs application enjoining Defendants from depriving Plaintiffs of their constitutionally protected property rights of developing their water rights pursuant to 42 USC 1983.

5. The Court finds that the Plaintiffs, City of Colorado Springs and City of Aurora, are municipal corporations and, as such, are not citizens within the meaning of the Fourteenth Amendment. As the State Supreme Court held in *Orchard City v. Delta County Commissioners*, 751 P.2d 1003, 1006 (Colo. 1988), "being but creatures of the State, municipal corporations have no standing . . . to invoke the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator. . . . [T]he Fourteenth Amendment simply does not prescribe guidelines and impose restrictions upon one political subdivision vis-a-vis another political subdivision." *Orchard City*, at 1006, fn.3; *South Macomb Disposal v. Township of Washington*, 790 F.2d 500, 503 (6th Cir. 1986).

6. The Cities therefore have no standing to assert purported constitutionally protected property rights in a 42 USC 1983 claim.

7. The Court further finds a political subdivision of a state cannot challenge the constitutionality of another

political subdivision's ordinance on due process grounds. The Fourteenth Amendment does not prescribe guidelines or impose restrictions upon one political subdivision of a state vis-a-vis another political subdivision of the state; and the relationship between the entities is a matter of state concern. The Fourteenth Amendment protections and limitations do not apply in this instance either. *South Macomb, supra.,* at 505.

8. The Court therefore grants Defendants' Motion in part and properly dismisses Plaintiffs' Sixth and Thirteenth Claims for Relief but denies Defendants' Motion as to the Twelfth Claim.

DONE AND SIGNED this 22nd day of July, 1988.

BY THE COURT:

/s/ Wm L Jones
Wm. L. Jones, Chief Judge
District Court

APPENDIX H

DISTRICT COURT, COUNTY OF EAGLE, STATE OF COLORADO
Civil Action No. 88 CV 142

ORDER

CITY OF COLORADO SPRINGS and CITY OF AURORA, Colorado Municipal Corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under Section 24-65.1-101, *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;

11. DIVISION OF WILDLIFE, STATE OF COLORADO;
12. EAGLE COUNTY SHERIFF, in his official capacity;
13. HOLY CROSS WILDERNESS DEFENSE FUND;
14. JAMES FRANKLIN LAMONT;
15. RED CLIFF WATER AND SANITATION DISTRICT;
16. TOWN OF EAGLE, COLORADO;
17. TOWN OF GYPSUM, COLORADO'
18. TOWN OF MINTURN, COLORADO;
19. TOWN OF RED CLIFF, COLORADO;
20. TOWN OF VAIL, COLORADO;
21. UPPER EAGLE REGIONAL WATER AUTHORITY;
22. UPPER EAGLE VALLEY SANITATION DISTRICT;
23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
24. VAIL ASSOCIATES, INC.; and
25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

THE COURT, having considered the Plaintiffs Motion to Amend Complaint, the Response and Reply thereto, along with the pleadings and exhibits appended thereto,

AND BEING fully advised in the premises, enters the following findings and Order:

1. Plaintiffs (Cities) move the Court for leave to amend their Complaint filed March 18, 1988, such amendment proposing the addition of a Fourteenth and Fifteenth Claim for Relief.

2. The Fourteenth Claim is a demand for repayment to Plaintiffs of an application "fee" which Plaintiffs' allegedly paid to Eagle County in the amount of $191,478.44 under protest. Plaintiffs claim the application "fee" assessed pursuant to Eagle County Land Use Regulation Section 6.01.23 and C.R.S. 24-65.1-501(1)(a) includes amounts not contemplated by C.R.S. 24-65.1-501(1)(a) and was not set within the required ten days of the County's receipt of Plaintiffs' application to develop water rights it owns within the county. Plaintiffs further claim in their motion to amend that the County was given notice on March 16, 1988 by Plaintiffs that the payment was made under protest, it was improperly assessed and they demanded return with interest. Plaintiffs also claim no response has been received from the County regarding their demand.

3. The Eagle County Defendants (captioned above as Defendants 1. through 6.) respond that the proposed Fourteenth Claim seeking declaratory relief is an entirely new claim and is untimely even if it seeks a declaratory judgment since it was not brought within the 30 day limitation contained in Rule 106(b). *Citing Greyhound Racing Association v. Colorado Racing Commission,* 589 P.2d 70 (Colo. App. 1978).

4. The Court notes the Eagle County Defendants argument that failure to appeal within the applicable 30 day time limit is a jurisdictional defect, and that a Plaintiff cannot circumvent these time limitations by attempting to obtain declaratory relief. *See Trinen v. City and County of Denver,* 725 P.2d 65 (Colo.App. 1986); *Snyder v. City of Lakewood,* 542 P.2d 371, 376 (Colo. 1975); and

Greyhound Racing Association of Southern Colorado, Inc. v. Colorado Racing Commission, 589 P.2d 70 (Colo.App. 1978).

5. However, the Court finds when a petition for review under Rule 106(a)(4) is *timely* filed, the Court of Appeals has followed a different line of cases than *Trinen, Greyhound* and *Snyder*. When a petition for review is timely filed under the rule, public policy requires the joinder of all claims for relief in one action. *See Powers v. Board of County Commissioners*, 651 P.2d 463, 464 (Colo.App. 1982), distinguishing *Snyder; Norby v. City of Boulder*, 577 P.2d 277 (1978); and *Wilson v. Town of Avon*, 749 P.2d 990, 992 (Colo.App. 1987). And a trial court errors by deyning [sic] leave to amend a Rule 106(a)(4) petition adding a claim for declaratory relief on a money demand issue which was not heard nor within the jurisdiction of the inferior tribunal. *See Wilson, supra.* at 992.

6. The Court thus grants Plaintiffs' Motion to Amend adding the Fourteenth Claim for Relief.

7. The Court next addresses the Plaintiffs proposed Fifteenth Claim. The Court finds the Cities proposed Fifteenth Claim alleges the deprivation of a constitutionally protected property interest of the Cities and seeks just compensation which is similar to the issues presently before the Court in the Eagle County Defendants' Motion to Dismiss Plaintiffs Sixth, Twelfth and Thirteenth Claims for Relief. The Court concludes, as it has on even date herewith in its Order dismissing Plaintiffs originally filed Six and Thirteenth claims, that municipal corporations are creatures of the State and

have no standing to invoke the protections of the Fourteenth or Fifth Amendments to the Constitution in opposition to the will of their creator. In other words, the Fourteenth and Fifth Amendments simply do not prescribe guidelines and impose restrictions upon one political subdivision vis-a-vis another political subdivision. *Orchard City v. Delta County Commissioners,* 751 P.2d 1003, 1006 (Colo. 1988); *Village of Arlington Heights v. Regional Transportation Authority,* 653 F.2d 1149 (1981); and *See Generally,* 16A Am.Jur.2d Constitutional Law, Section 744.

8. The Court thus denies Plaintiffs' Motion to Amend which proposes the addition of Plaintiffs' Fifteenth Claim because the Court has found that municipal corporations have no standing to bring constitutional claims against the state or another of the state's political subdivisions. *Arlington, supra.* at 1153.

DONE AND SIGNED this 22nd day of July, 1988.

BY THE COURT:

/s/ Wm L Jones
Wm. L. Jones, Chief Judge
District Court

APPENDIX I

DISTRICT COURT, EAGLE COUNTY, COLORADO

Case No. 88 CV 142

ORDER REMANDING PERMIT APPLICATION CONSIDERATION TO THE BOARD OF COUNTY COMMISSIONERS

CITY OF COLORADO SPRINGS AND CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO; *et al.*

Defendants.

THIS MATTER comes before the Court on cross motions for Summary Judgment in this Rule 106 action. The Court has reviewed the motions, responses, replies and exhibits, and being fully advised, makes the following findings of fact:

Factual Background

The Cities of Colorado Springs and Aurora ("Cities") are owners of decreed water rights in Eagle County. Cities are home-rule municipalities with charter provisions allowing extra-territorial construction, maintenance, and operation of waterworks. A portion of such water rights were developed through Phase I of the

Homestake Project, completed in 1966. Phase I of the Homestake Project was designed to accommodate additional flows to be developed at a later date.

The diversion sites for Phase II of the Homestake Project ("Project") are located entirely on United States Forest Service lands. These lands were designated by Congress in 1980 as the Holy Cross Wilderness. At the time of the designation as a wilderness, the Cities received a comprehensive statutory exemption allowing for the development of their previously existing water rights.

In the course of developing the Project, the Cities proceeded through a review process under the National Environmental Policy Act ("NEPA"). Eagle County participated in the NEPA proceedings. As part of the NEPA procedures, an Environmental Impact Statement ("EIS") was prepared.

The Cities also sought a land use permit from the U.S. Forest Service under the provisions of the Federal Land Policy Management Act ("FLPMA"). The FLPMA permit was granted with conditions addressing environmental and land use concerns.

The Cities were also granted a section 404 permit from the Army Corps of Engineers pursuant to the federal Clean Water Act. The 404 permit for dredge and fill activities contained conditions to mitigate environmental damage.

On May 20, 1985, the Cities applied to the Eagle County Board of County Commissioners ("Board") for approval of the Project as a major extension of an existing

water project, efficient utilization of an existing water systems, location approval pursuant to CRS 30-28-110, and a Certificate of Designation pursuant to 30-20-101 *et seq.* ("Application").

The Application was reviewed for completeness by the Eagle County Planning Department. On July 23, 1985, the Planning Department found the Application incomplete. The Cities resubmitted the Application with supplemental materials on January 2, 1986. The Planning Department found the Application complete on March 11, 1987, pending receipt of additional information, subsequently provided.

Public hearings were held on the Application on April 20-April 24, 1987, May 14-May 16, 1987, May 18-May 20, 1987 and September 9, 1987.

The Eagle County Planning Commission, in Resolution No. 88-15, recommended approval of the Application subject to compliance with certain conditions. The Cities stipulated that they did not want the Board of County Commissioners to consider any alternatives, except that presented in the Application. On February 22, 1988, the Eagle County Board of County Commissioners unanimously voted to deny the Cities' Application.

Procedural Background

A complaint was filed in this action by the Cities on March 18, 1988. The original complaint contained twelve claims for relief; an amended complaint filed June 22, 1988 asserted two additional claims.

By Order dated July 22, 1988, the Court, pursuant to defendant County of Eagle ("County") motion, dismissed plaintiffs' Sixth and Thirteenth Claims and disallowed the amendment adding the Fourteenth Claim. Consequently, there are eleven remaining claims in this action.

The following original defendants have been dismissed from this action: Colorado Council of Trout Unlimited; Division of Wildlife, State of Colorado; James Franklin Lamont; Town of Vail, Colorado; Upper Eagle Regional Water Authority; Upper Eagle Valley Sanitation District; and Vail Associates, Inc.

The following original defendants have filed a Disclaimer in this action: Town of Minturn, Colorado; and Eagle County Historical Society.

The following original defendants have indicated, by letters to the Court, that they do not wish to participate in this action: Red Cliff Water and Sanitation District; and Town of Red Cliff, Colorado.

The following original defendants have filed no answer to the complaint; Colorado River Outfitters Association; Eagle County Sheriff, in his official capacity; and the Town of Gypsum, Colorado.

The remaining claims are as follows:

First Claim: Sections 24-65.1-101 *et seq.* are unconstitutional insofar as they attempt to vest counties with authority to regulate or deny construction of waterworks by home rule municipalities.

Second Claim: Construction of the Project is a local, municipal concern and the Charters of the Cities supersede the statutes and regulations relied upon by the Board in denying their permits.

Third Claim: CRS Sec. 24-65, 1-101 *et seq.* constitutes an unlawful delegation of authority over municipal waterworks to county commissions.

Fourth Claim: The provisions of CRS Sec. 24-65.1-101 *et seq.* and CRS 30-20-103 are each void as an impermissible delegation of authority of matters of state-wide concern to local governments.

Fifth Claim: Plaintiffs are acting as a public utility, and as such are exempt from the provisions of Sec. 24-65.1-101 *et seq.*

Sixth Claim: Dismissed.

Seventh Claim: Plaintiffs are acting as a public utility in the construction of the project under CRS 30-28-110 and the provisions of that statute supersede any regulatory authority over the Project bestowed upon Eagle County by CRS Sec. 24-65.1-101 *et seq.*

Eighth Claim: The Board has exceeded its jurisdiction in attempting to regulate the Project.

Ninth Claim: The Board acted in an arbitrary and capricious fashion and abused its discretion by specific actions in denying the Permits.

Tenth Claim: The Board acted in an arbitrary and capricious fashion and abused its discretion by denying plaintiffs' permits in the face of a complete and accurate

Application, supplemented with hearing testimony and exhibits, which all met lawful criteria.

Eleventh Claim: By virtue of its attempt to regulate the Project and deny permits, the Board has acted outside the scope of its jurisdiction and in violation of the provisions of CRS 31-35-402(1).

Twelfth Claim: Plaintiffs have been denied due process under the United States and Colorado Constitutions by specific acts of the Board.

CONCLUSIONS OF LAW

The Court makes the following Conclusions of Law:

Issues raised in plaintiff's first, second, third, fourth, fifth and seventh claims have been addressed by the Colorado Supreme Court in *City and County of Denver v. Board of County Commissioners of Grand County.* 782 P.2d 753 (Colo. 1989) (*"Grand County"*). In *Grand County,* a municipality brought an action seeking a declaration that it need not obtain permits from Grand and Eagle Counties to construct and operate water collection and diversion facilities in Grand and Eagle Counties. In affirming summary judgments entered in favor of the Counties, the Supreme Court discussed the following issues, which effectively dispose of many of plaintiffs' claims:

Plaintiffs' First Claim

Plaintiffs' first claim contends that certain provisions of CRS 24-65-101 *et seq.* ("Land Use Act") constitute unconstitutional regulation of the powers of a home rule municipality. The court in *Grand County* held the Land

Use Act does not infringe on the exercise of a home-rule municipalities powers in violation of Article XX of the Colorado constitution, 782 P.2d at 761, 762.

Therefore, the Court concludes that plaintiff's first claim for relief is without merit as a matter of law.

Plaintiffs' Second Claim

Plaintiffs' second claim contends that construction of the Homestake II Project ("Project") is a local, municipal concern of the City of Colorado Springs and the City of Aurora under the state constitution, which supersedes conflicting state law. Article XX, Section 6 of the Colorado Constitution provides, in part,:

> The people of each city or town of this state, having a population of two thousand . . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.
>
> Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of the city or town any law of the state in conflict therewith.

Construction of a municipal water project outside the territorial limits of the municipality is a matter of mixed state and local concern. *Grand County* at 763. The Court concludes that the Homestake II Project is a municipal water project to be constructed outside the territorial limits of the plaintiff municipalities. The powers of a

home-rule municipality in constructing an extra-territorial water project do not supersede applicable state law. *Id.* Consequently, the Court concludes that plaintiffs' second claim is without legal merit.

Plaintiffs' Third Claim

Plaintiff's third claim contends that the Land Use Act constitutes an unlawful delegation of authority over municipal matters to counties. The grant of power concerning regulation of activities of state interest in the Land Use Act does not unconstitutionally delegate legislative authority to local governments. *Grand County* at 760. The Court has previously concluded that the Homestake II Project is an activity of mixed state and local concern. Therefore, the Court concludes that plaintiffs' third claim is legally without merit.

Plaintiffs' Fourth Claim

Plaintiffs' fourth claim contends that CRS 24-65.1-101 of the Land Use Act and CRS 30-20-103, which requires a county permit for a solid waste disposal project, represent an unconstitutional delegation of matters of statewide concern to local entities. In matters of statewide concern, enactments of the General Assembly take precedence over enactments of home-rule cities. *Grand County* at 762. The legislature, acting in the interest of the state, has developed a detailed statutory scheme in areas and activities of state interest which has been held to apply to the construction of extra-territorial municipal water projects. As such, the Land Use Act prescribes the procedure by which construction of municipal water projects located

outside of the territorial limits of the municipality are regulated. The procedures established in the Land Use Act prevent uncontrolled exercises of discretionary power by local governments. *Grand County* at 760. Therefore, the Court concludes that the Land Use Act does not result in an unconstitutional delegation of the state's powers to the counties.

CRS 30-20-103 provides, in pertinent part,:

> Any person desiring to operate a solid wastes disposal site and facility within the unincorporated portion of any county shall make application to the board of county commissioners of the county in which such site or facility is or is proposed to be located for a certificate of designation. . . .

The statute further provides that approval will be based on criteria established by the state board of health, the water quality control commission and air quality control commission. Other sections of the Solid Wastes Act provide detailed procedures and criteria for the board to use in determining whether to grant a permit. The Solid wastes Act delegation procedures do not violate the Colorado constitution. *City and County of Denver v. Eggert*, 647 P.2d 216, 226-227 (Colo. 1982).

Therefore, the Court concludes that neither the Land Use Act nor the Solid Wastes Act constitute an unconstitutional delegation of matters of statewide concern to local entities. Hence, plaintiffs' fourth claim is without legal merit.

Plaintiffs' Fifth Claim

Plaintiffs' fifth claim contends that activities of Public Utilities are exempt from county regulation under the Land Use Act, specifically CRS 24-65.1-105. The relevant portions of 24-65.1-105 provide:

> (1) With regard to public utilities, nothing in this article shall be construed as enhancing or diminishing the rights or the power and authority of municipalities, counties, or the public utilities commission . . .
>
> (2) Nothing in this article shall be construed as enhancing or diminishing the rights and procedures with respect to the power of a public utility to acquire property and rights-of-way by eminent domain to serve public need in the most economical and expedient manner.

Extraterritorial water services of a municipality are exempt from regulation of the rates, fees, tolls or charges for such services. *Board of County Commissioners v. Denver Board of Water Commissioners,* 718 P.2d 235, 245 (Colo. 1986) ("Tri Counties"). However, the court in *Grand County* expressly stated that *Tri Counties* did not hold that a municipality's construction and operation of water projects enjoyed a general immunity from regulation. *Grand County* at 764. Rather, the *Grand County* court held that municipalities were subject to the regulation contemplated in the Land Use Act. *Id.* Therefore, the court concludes that plaintiffs' fifth claim must fail as a matter of law.

Plaintiffs' Seventh Claim

Plaintiffs' seventh claim contends that CRS 30-28-110(1)(c) supersedes Eagle County's authority under the Land Use Act. CRS 30-28-110 provides, in part,:

> (1)(a) Whenever any county planning commission has adopted a master plan of the county or any part thereof, no road, park or any public way, ground or space, . . . shall be constructed or authorized in the unincorporated territory of the county until or unless the proposed location and extent thereof has been submitted to and approved by such county or regional planning commission.
>
> * * *
>
> (c) If the public way, ground, space, building, structure or utility is one the authorization or financing of which does not, under the law governing the same, fall within the province of the board of county commissioners or the county officials or board, the submission to the commission shall be by the body or official having such jurisdiction, and the commission's disapproval may be overruled by said body by a vote of not less than a majority of its entire membership or by said official. . . .

Section 30-28-110 and the Land Use Act are not facially inconsistent. *Grand County* at 766. Any arguable power granted to a home-rule city in subsection 30-28-110(1)(c) to overrule planning commission disapproval of a project does not give the city unrestricted authority to ignore regulations adopted pursuant to the Land Use Act. *Grand County* at 766. Therefore, the Court concludes that 30-28-110 does not supersede the Land

Use Act. Consequently, plaintiffs' seventh claim is without legal merit.

Federal Preemption

Many of the criteria upon which the Board based its denials of permits for the Homestake II Project are not areas the County Commissioners have authority to regulate. The Proposed project is located entirely on federal Forest Service land. Generally, comprehensive federal laws preclude a county or state from prohibiting a specific land use on federal land. *Brubaker v. Board of County Commissioners, El Paso County,* 652 P.2d 1050 (Colo. 1982). However, a state or county may regulate local environmental conditions on federal lands. *Granite Rock Company v. California Coastal Commission,* 480 U.S. 677 (1987).

The Court concludes that federal law preempts any authority under which the county could arguably regulate land use on federal forest service land. Generally, where congressional legislation either explicitly or implicitly reflects an intent to occupy an entire field, state legislation dealing with the same area is precluded. *Brubaker* at 1055. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. *Id.*, citing *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947).

Section 1712(f) of the Federal Land Policy and Management Act ("FLPMA") provides:

> (f) The Secretary [of Interior] shall allow an opportunity for public involvement and by regulation shall establish procedures, including

> public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of public lands.

43 U.S.C. Sec. 1712.

Section 1604(d) of the National Forest Management Act ("NFMA") provides:

> The Secretary [of Agriculture] shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

16 U.S.C. Sec. 1604.

The Court concludes that requiring the federal managing agencies to allow a party to participate in formulating plans for the management of federal public lands implies that the same party may not separately regulate the same activities on the same public lands. Therefore, the combined scheme of federal regulation provided for in FLPMA and NFMA occupies the field of land use planning on National Forest lands. Here, the County participated in public hearings on the Project which were held pursuant to FLPMA and NFMA. Therefore, County

regulation of the land use aspects of the Project is preempted by federal law.

The Court has previously found that the Cities stipulated that they did not wish the Board to consider alternatives to the submitted Application. Therefore, the Board did not determine that a permit for the Project would be denied under any circumstances. Consequently, the question of whether the Board has authority to deny the Permits categorically is not before the Court. However, the preemption doctrine has been held to preclude zoning officials from denying a special use permit for drilling on federal land, notwithstanding the proposed activities were inconsistent with the county's long range land use planning. *Brubaker,* 652 P.2d at 1053.

Here, the Board based its permit denials, in part, on land use planning criteria. As a result, the Court concludes that any of the findings of fact relied upon by the Board in denying the permits which relate to land use were improper (Findings I5, I(10), I(19), I(14), II(15), III(A)(1), III(A)(2), III(B)(1), III(B)(2), IV(1) and IV(2)).

State Preemption

In addition, state law preempts county regulation in some areas of environmental concern. Water quality and water rights are two areas in which the state has statutorily determined it is the final authority. Water quality is exclusively regulated by the Water Quality Control Commission through the Water Quality Control Division. CRS Sec. 25-8-102(4) ("This article and the agencies authorized under this article shall be the final authority on the administration of water pollution prevention,

abatement and control."). Plaintiff Cities have obtained the necessary permits and approvals by the Water Quality Control Commission. Therefore, the Board may not deny plaintiffs' permits based on concerns about water quality (Findings I(4), I(5), I(8), I(9), I(11), II(6) and II(7)).

Regulation of water rights is within the exclusive jurisdiction of the State Engineer. CRS Sec. 37-92-301(1); *State ex rel Danielson v. Vickroy,* 627 P.2d 752 (1981). Minimum in-stream flows and diversion conditions have been set by the State Engineer for the Homestake II Project. Therefore, the Court concludes that findings of fact relied on by the Board in denying plaintiffs' permits which concerned water quantity, including impacts on rafting businesses, were improper (Findings I(4), I(5), I(6), I(7), II(4) and II(5)).

Permit for a Major Extension of an Existing Water Collection System

In reviewing the Board's findings of fact, the only criteria on which the Board could properly rely in denying Cities' Permit for a Major Extension of an Existing Water Collection System (Part I of the Board Resolution) were those relating to wetlands, aquatic habitat, and possibly the nuisance factors which may effect the environment of Eagle County. Since this results in only six of the twenty findings of fact being relevant to permit denial, it is not possible to determine with any certainty what the result of the Board's decision would have been in absence of consideration of the majority of the findings.

Permit for Efficient Utilization of a State Water Project

The second permit denied by the Board was for Efficient Utilization of a State Water Project (Part II of the Board's Resolution). Again, the Board is precluded from basing its denial on land use considerations when the project is to be located entirely on federal lands. Therefore, the Court concludes that the findings based on environmental damage to wetlands and aquatic habitats are the only findings on which the Board could properly base its permitting decision. In absence of the findings relied on by the Board in denying the Cities' second permit which were not areas allowed to be regulated by the County, it is not possible to determine what the outcome of the permit decision would be.

Special Use Permit

Section III of the Board's Resolution was a denial of a Special Use Permit. As stated above, the County does not have the authority to deny a land use on federal land which has been approved by the federal agencies with responsibility for regulating the federal land in question. Of the findings relief on by the Board in denying plaintiffs Special Use Permit, all but two are related to land use planning. Finding III(A)(3) states that "The Project may adversely effect fish, wildlife or migratory ranges." Finding III(A)(4) states that "Evidence presented at the hearing failed to demonstrate that the adverse effect on fish, wildlife or migratory ranges can be adequately mitigated." The Board may regulate activities which cause environmental impacts, but not completely prohibit a

federally approved land use. Therefore, the Court concludes that it cannot determine what the Board's decision would be in absence of reliance on the irrelevant findings of fact.

Certificate of Designation

CRS Sec. 30-20-104 lists the factors to be considered in reviewing an application for a certificate to operate a solids wastes disposal site. CRS 30-20-104 provides, in part,:

> (1) In considering an application for a certificate of designation, the board of county commissioners shall take into account:
>
> (a) The effect that the solid wastes disposal site and facility will have on the surrounding property, taking into consideration the types of processing to be used, surrounding property uses and values, and wind and climatic conditions;
>
> (b) The convenience and accessibility of the solid wastes disposal site and facility to potential users;
>
> (c) The ability of the applicant to comply with the health standards and operating procedures provided for in this part 1 and such rules and regulations as may be prescribed by the department;
>
> (d) Recommendations by local health departments.

Apparently, the Board denied the permit due to consideration of subsection (1)(a), concerning the effect the site would have on surrounding property. The Board had

earlier found that the "neighborhood" to be considered included the land surrounding the federal forest land. The Court concludes that federal agencies administering such lands are the proper authority to determine land uses within the national forest.

Two of the findings of the Board would arguably justify denial of the Certificate of Designation. Unfortunately, these findings, that the Project did not conform with the Eagle County Master Plan and was not compatible with surrounding property, are not areas in which the County has any authority to regulate. Therefore, the Court concludes these findings are irrelevant.

Consequently, the Court concludes that the Board, in finding all other considerations mitigated in favor of approval of the Certificate of Designation, and having no authority to dictate land use planning on federal lands, effectively approved the Certificate of Designation.

The Court notes that due process violations and abuse of discretion claims have been made concerning the permitting process. The Court concludes that no due process violations occurred. However, the Court does not reach the abuse of discretion claim, finding that the Board's decision was insufficient as a matter of law.

The Court defers ruling on the claim that the permit fee was illegal until the Board has reconsidered its permit decisions.

THEREFORE, THE COURT ORDERS:

Plaintiff's First, Second, Third, Fourth, Fifth and Seventh Claims are dismissed.

The applications for a Permit for A Major Extension of a Water Project, Permit for Efficient Utilization of Municipal Water Project and the Special Use Permit are hereby remanded to the Eagle County Board of Commissioners for reconsideration in conformance with this Order. The Court defers ruling on the propriety of the Permit fees charged until after the Board's reconsideration, at which time an evidentiary hearing will be held, on that issue only.

DONE THIS 2nd DAY OF JULY, 1991.

BY THE COURT:

/s/ Wm. Jones
DISTRICT JUDGE

APPENDIX J

DISTRICT COURT, EAGLE COUNTY, COLORADO

Case No. 88 CV 142

ORDER SETTING ASIDE DECISION OF COUNTY COMMISSIONERS

CITY OF COLORADO SPRINGS AND CITY OF AURORA, Colorado municipal corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under Sec. 24-65.1-101, et seq., C.R.S.
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;
12. EAGLE COUNTY SHERIFF, in his official capacity;
13. HOLY CROSS WILDERNESS DEFENSE FUND;
15. RED CLIFF WATER AND SANITATION DISTRICT;
16. TOWN OF EAGLE, COLORADO;
17. TOWN OF GYPSUM, COLORADO;

18. TOWN OF MINTURN, COLORADO;
19. TOWN OF REDCLIFF, COLORADO;
23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

THIS MATTER comes before the Court on appeal from a decision by defendant Board of County Commissioners of Eagle County ("Board"). The Court has re-read the cross motions for Summary Judgment, Responses and Replies and Responses and Replies to the Decision on Remand. The Court has reviewed Board Resolution 91-104, the transcript of the hearings, and exhibits. Being fully advised, the Court makes the following Findings of Fact:

The Cities of Colorado Springs and Aurora ("Cities") are owners of decreed water rights in Eagle County. A portion of such water rights were developed through Phase I of the Homestake Project, completed in 1966. Phase I of the Homestake project was designed to accommodate additional flows to be developed at a later date. The Cities now seek to develop Phase II of the project.

The diversion sites for Phase II are located entirely on United States Forest Service lands. These lands were designated by Congress in 1980 as the Holy Cross Wilderness. At the time of the designation as wilderness, the Cities received a comprehensive statutory exemption allowing for the development of their water rights. The area in dispute is zoned R, for resource development by the county.

The Cities have received approval for the project from the federal agencies which have jurisdiction over its various aspects, specifically a 404 permit from the Army Corps of Engineers, and a permit from the U.S. Forest Service. On May 20, 1986, the Cities applied to Eagle County for permits for Major Extension of an Existing Water Project, Efficient Utilization of an Existing Water System, Approval pursuant to C.R.S. 30-28-110, and a Certificate of Designation pursuant to C.R.S. 30-20-101.

The Eagle County Planning Commission recommended approval of the Application subject to compliance with certain conditions. One of the 52 conditions imposed by the Planning Commission requires that any reductions in sales taxes directly attributable to a decrease in recreational visitor days caused by the project be assessed to the Cities and placed in an escrow account. There is no specific taxing authority over water projects granted to counties, and Eagle County has not passed a resolution applicable to this situation.

Public hearings were held, and on February 22, 1988, the Eagle County Board of County Commissioners unanimously denied the Cities' application for permits. This action was commenced on March 18, 1988. The following defendants have filed a Disclaimer in this action: Town of Minturn, Colorado; and Eagle County Historical Society. The following defendants have indicated, by letters to the Court, that they do not wish to participate in this action: Red Cliff Water and Sanitation District; and the Town of Red Cliff, Colorado. The following original defendants have filed no answer to the complaint: Colorado River Outfitters Association; Eagle County Sheriff, in his official capacity; and the Town of Gypsum, Colorado.

At the time this matter was first briefed, there were eleven remaining claims. By Order dated July 22, 1988, the Court dismissed plaintiff's Sixth and Thirteenth claims. In an order dated July 2, 1991, the Court ordered plaintiff's First, Second, Third, Fourth, Fifth and Seventh Claims dismissed. In the July 2 Order, the Court also determined that the Board had effectively granted the Cities' application for a Certificate of Designation.

In the July 2 Order, the Court determined that the Board had based its permit denial substantially on factors over which the county had no jurisdiction. The matter was remanded to the Board so it could consider whether the remaining valid factors were sufficient to support denial of the Cities' application for the remaining three permits. On remand, the Board affirmed the denial of the permits based on the following facts:

I. APPLICATION FOR A PERMIT TO CONDUCT A DESIGNATED ACTIVITY OF STATE INTEREST: A MAJOR EXTENSION OF AN EXISTING WATER COLLECTION SYSTEM:

1. The evidence shows that the proposed development will significantly deteriorate marshlands or wetlands.

2. The Applicant has failed to show that the proposed development will not significantly deteriorate aquatic habitats.

3. Evidence presented at the hearing failed to demonstrate that the significant deterioration of the wetlands can be adequately mitigated.

13. There may be a negative effect on the aquatic environment because of increases in water temperature which cause fish to be subject to disease.

14. Evidence presented at the hearing failed to demonstrate that the negative effect on the aquatic environment can be adequately mitigated.

15. The proposed development will cause nuisance factors such as increased traffic, dust, fire hazards, and dangers from hazardous chemical contamination, explosives and fuels. The mitigating measures proposed by the Cities fail to adequately satisfy this criterion.

II. APPLICATION FOR A PERMIT TO CONDUCT THE FOLLOWING DESIGNATED ACTIVITY OF STATE INTEREST: EFFICIENT UTILIZATION OF A MUNICIPAL WATER PROJECT:

1. The evidence shows that the proposed development will significantly deteriorate marshlands or wetlands.

2. The Applicant has failed to show that the proposed development will not significantly deteriorate aquatic habitats.

3. Evidence presented at the hearing failed to demonstrate that the significant deterioration of wetlands can be adequately mitigated.

8. There may be a negative effect on the aquatic environment because of increases in

water temperature which cause fish to be subject to disease.

9. Evidence presented at the hearing failed to demonstrate that the negative effect on the aquatic environment can be adequately mitigated.

III. SPECIAL USE PERMIT:

3. The project may adversely affect fish, wildlife or migratory ranges.

4. Evidence presented at the hearing failed to demonstrate that the adverse effect on fish, wildlife or migratory ranges can be adequately mitigated.

Both the Eagle County Planning Commission and the Board found that a wetland species shift would constitute a significant deterioration of wetlands. The Board failed to indicate what additional mitigation measures, over and above those tendered by the Cities, were necessary to mitigate alleged nuisance factors, or why the Cities tendered mitigation was inadequate.

A federal permit granted to the City by the Army Corps of Engineers states that the Cities have to devise a plan to "prevent loss of wetlands." The Corps permit also states that any mitigation utilized in conjunction with the Cities' wetland plan "shall not cause more than minimal visual intrusion to the wilderness area, and shall not have significant environmental impacts."

The only evidence in the record on aquatic habitats is found in the Base Line Report submitted by the Cities. There was no evidence presented on aquatic habitats by

any other parties refuting the Cities' Base Line Report. Furthermore, there was no testimony on the record that the project "may adversely affect fish, wildlife or migratory ranges."

ARGUMENTS

Cities argue that the Board's actions in denial of the three applications violated their due process rights, as evidenced by the Board's refusal to take official notice of the mitigation plans approved by the EPA and U.S. Forest Service. Furthermore, the Cities argue that the Board's decision was arbitrary and capricious and an abuse of discretion.

On remand, the Cities made a motion to the Board to submit federal agency documents. The motion requested that the Board take administrative notice of final federal decisions which were rendered after the close of the Board's administrative record and after the Board's initial decision. The Cities argue that they did not wish to reopen the record to add evidence, but believed that the Board would want to consider, in its analysis, the content of the final federal approvals as they regard monitoring and mitigation of potential environmental impacts.

The federal documents submitted with the motion identify the federally imposed conditions which must be met by the Cities in the construction and operation of the project. The defendants, including Eagle County and Holy Cross Wilderness Defense Fund ("HCWDF"), participated in the federal process which resulted in the final federal permitting. In addition, a federal suit challenging,

among other things, the federal procedure in promulgating the federal documents, was dismissed.

The Board denied the motion to take administrative notice of the documents. The Cities contend that the federal documents they sought to admit to the record were for the purpose of establishing the conditions imposed by the federal agencies relative to monitoring and mitigation requirements, not for the purpose of establishing the propriety of the conditions, or the data upon which they are based.

Conversely, HCWDF contends that the doctrine of taking official notice is inapplicable. HCWDF distinguishes the cases cited by the Cities by stating that these cases related to taking notice during the original proceeding, not taking notice on remand. Further, HCWDF disputes that efficacy and scientific basis of the "proposals" for mitigation and states that if the record were to be reopened, it could put on relevant rebuttal evidence. As noted above, HCWDF had the opportunity to rebut the evidence at the federal level. Finally, HCWDF contends that reopening the record on remand would have violated HCWDF's and other parties' due process rights.

The Cities also seek a determination that the County did not comply with the Court's order on remand by failing to examine and rebalance the facts in the record over which they had jurisdiction, but rather limited the parties to legal argument regarding whether the criteria for approval were satisfactorily met.

The Cities additionally argue that the Board does not have the power to deny a project built by a home-rule

municipality, which is to be built on federal lands and has received federal approval.

Finally, the Cities have alleged bias on the part of two commissioners. Specifically, the Cities' pertinent allegations are: 1) Commissioner Gustafson was present on behalf of the Western Alliance to Encourage Responsibility ("W.A.T.E.R.") at a federal environmental assessment meeting urging adoption of a position against the project; 2) Commissioners Gustafson and Welch are signatories to a petition circulated prior to October 1984 demanding that federal, state and local officials protect the Holy Cross Wilderness by denying permits for the project at issue; 3) Gustafson testified before a Congressional subcommittee meeting against the Homestake II project; 4) Newspaper articles on the campaigns of Welch and Gustafson show that both ran on platforms of opposition to the Homestake II project; 5) The denial by the Board was despite the recommendation for approval by both the Director of the County Community Development Department and the Eagle County Planning Commission.

The County asserts that in the wake of the Court's preemption rulings there remained sufficient grounds to affirm the Board's previous decision. The Board contends that its action in denying the Cities' applications in its original 1988 decision was not predicated on federal permitting actions, and any subsequent federal actions are of no effect on the county permitting process.

The Cities have responded by stating that the Board took administrative notice of an EPA letter from Gene Reetz to Dave Stark ("EPA letter"), which was not a final

agency decision at an earlier proceeding. The EPA letter was submitted and admitted after the close of the hearing, but prior to deliberation on the original decision. The Board had indicated during the original hearings, that it would take notice of final agency decisions. After the admission of the EPA letter on November 3, 1987, the Board did not permit the filing of responsive documents by the parties, nor did it allow cross examination of the author.

The Cities also claim that the Board lacked the power of denial. The Cities contend that, although the laws pertaining to federal permits require compliance with applicable state laws, any preempted state or local law is not an "applicable law." Furthermore, the holdings in *California Coastal Commission v. Granite Rock*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1988) and *Columbia Basin Land Protection Assn. v. Schlessinger*, 643 F.2d 585 (9th Cir. 1981) support their contention that a county may not deny a permit to operate a federally approved project on federal land.

THE COURT makes the following Conclusions of Law:

The Court adopts the findings and conclusions in the Court's previous orders, dismissing plaintiff's First, Second, Third, Fourth, Fifth, Sixth, Seventh and Thirteenth Claims.

When this Court remanded the decision, it asked that the Board determine whether it would still deny the permits if the 14 invalid findings, out of 20 total, were taken away. This implies a re-evaluation of the facts

supporting the remaining findings. This was not done by the Board.

DENIAL OF DUE PROCESS RIGHTS

After reviewing the transcripts of the proceedings before the Board in this matter, and the resolutions resulting from the hearings, the Court has no choice but to conclude that the Board denied the Cities due process. Specifically, the Board concluded that environmental impacts either would or "may" occur and the Cities failed to prove adequate mitigation. However, the Board refused to take official, or administrative, notice of the federally approved environmental mitigation plans. Although the Court is sympathetic to the Board's dilemma in "cutting off" what could be an endless flow of evidence, the fact is that the federally approved mitigation plans were the most relevant evidence on the very topic on which the permit denials were based.

To meet due process standards, all parties must be given, among other things, the opportunity to offer evidence in explanation or rebuttal. *Nesbit v. Industrial Commission*, 607 P.2d 1024, 43 Colo.App. 398 (1979), cert. den. Here, the Board made its decision based on failure of the Cities' mitigation plans, without considering federally required mitigation, and did not allow the Cities to offer what is arguably the most competent evidence of mitigation. The reason given for refusal to take notice of the federally approved plans was violation of the other parties' due process rights. However, the Board had earlier taken notice of a letter written by an EPA employee, not a final agency decision, to which the Cities were not given

a chance to rebut the conclusions contained therein or cross-examine the author. The Board cannot admit evidence, deny an opportunity for rebuttal and then close the door on any evidence from the Cities. Denial of the Cities' motion to take official notice of the federal documents was a violation of due process.

A decision maker is not disqualified on due process grounds simply for having taken a position, even in public, on policy issues related to a dispute, if there is no showing that the decision maker is incapable of judging particular controversy fairly on the basis of its own circumstances. *Mountain States Tel. and Tel. Co. v. Public Utilities Com'n of State of Colo.*, 763 P.2d 1020 (1988). Here, two of the commissioners took public positions against a general policy of transmountain diversions of water. In addition, there is evidence that these commissioners publicly indicated a predetermined outcome on this particular case. However, it is equally probable that the commissioners were stating their position on the federal permit decisions, which they later refused to recognize. Given the lack of direct evidence of bias, the Court declines to find the actions of the two commissioners to be a violation of the Cities' rights on the basis of bias.

ABUSE OF DISCRETION

Although administrative hearings need not comply with strict rules of evidence, evidence possessing probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs should be admitted. *Fueston v. City of Colorado Springs*, 713 P.2d 1323 (Colo.App. 1985). The Court concludes that making the

decision to deny the permits, in absence of the most relevant evidence for the Applicant, was an abuse of discretion.

ARBITRARY AND CAPRICIOUS

In order for a court to set aside a decision by an administrative body on the ground that it is arbitrary and capricious, the court must find that the decision is unsupported by any competent evidence. *Board of County Commissioners of Jefferson County v. Simmons*, 494 P.2d 85, 177 Colo. 347 (Colo. 1972). Here, the Board's decision was based on deterioration of aquatic habitats, deterioration of wetlands, changes to the aquatic environment, and possible effect on fish, wildlife or migratory ranges, and the Cities failure to demonstrate adequate mitigation. However, the only evidence in the record concerning aquatic habitats is found in evidence supplied by the Cities. Furthermore, there is no evidence in the record concerning the effect on fish., wildlife or migratory ranges. Finally, evidence of federally required mitigation of the deterioration of wetlands was not allowed in the record.

The final fact found by the Board concerning nuisance factors relates only to the building of the project, and not to its operation. Although the County argues that it views the Homestake II project differently than other development within the county because it will be completed in a wilderness area, this argument is refuted by the fact that when the Holy Cross Wilderness was created, and exemption allowing the development of the Cities' previously decreed water rights was part of the

wilderness designation. Therefore, the area is not designated as wilderness by the federal government for purposes of the Homestake II project. Furthermore, the county zoning designation of the area in question is not a wilderness designation. Consequently, the argument by the County that the nuisance factors have a greater impact due to the wilderness status of the land surrounding the project is without merit.

In light of the fact that the Board approves other projects in the county which create the same nuisance factors, it is hard to say permit denial based legally only on this factor is supported by competent evidence. Courts are not to stand idly by and permit the arbitrary and unjustified exercise of discretion. *Colorado State Bd. of Nurse Examiners v. Hehu*, 268 P.2d 401, 129 Colo. 125 (Colo. 1954). The Court concludes that the decision of the Board is not supported by competent evidence and is therefore arbitrary and capricious.

OTHER ISSUES

The Cities contend that one of the conditions imposed by the Planning Commission, that they compensate the county for lost tax revenues, constitutes an illegal tax. First, there is no evidence that there will be lost revenues. Second, there is no procedure by which such "lost" revenues can be determined and, therefore, the basis of this tax is speculative. Furthermore, it is an illegal tax, as the county has no authority to tax this water project.

Finally, the Cities contend the permit application fee charged is excessive. On the face of it, there appears to be

merit to this assertion. The Court will address that issue in a separate hearing.

THEREFORE, THE COURT ORDERS:

The Cities' due process rights were violated in the course of the denial of their permit applications. The action of the Board was arbitrary and capricious and an abuse of discretion. Consequently, the decision denying the Cities' permit applications is vacated and remanded to the Board with directions to approve the three permits in question, subject to the federally imposed conditions.

The Cities will set a hearing to determine the propriety of the fees charged for the application.

DONE THIS 14 DAY OF July, 1992.

BY THE COURT:

/s/ Wm. Jones
DISTRICT JUDGE

APPENDIX K

DISTRICT COURT, EAGLE COUNTY, COLORADO

Case No. 88 CV 142

ORDER ON RECONSIDERATION

CITY OF COLORADO SPRINGS AND CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under Sec.24-65.1-101, et seq., C.R.S.
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;
12. EAGLE COUNTY SHERIFF, in his official capacity;
13. HOLY CROSS WILDERNESS DEFENSE FUND;
15. RED CLIFF WATER AND SANITATION DISTRICT;
16. TOWN OF EAGLE, COLORADO;
17. TOWN OF GYPSUM, COLORADO;
18. TOWN OF MINTURN, COLORADO;

19. TOWN OF REDCLIFF, COLORADO;
23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

THIS MATTER comes before the Court on the Board of County Commissioners of the County of Eagle's (the "County" or the "Board") motion for reconsideration, or in the alternative for entry of partial final judgment pursuant to Rule 54(b). Defendants Holy Cross Wilderness Defense Fund ("HCWDF") and Vail Valley Consolidated Water District have also filed motions for reconsideration. Collectively, the Court will refer to HCWDF, the County, the Board and Vail Valley Consolidated Water District as "Defendants." The Court has read the Motion, Responses and Replies, and being fully advised, makes the following findings of fact:

The Defendants request that the Court reconsider its order of July 14, 1992 ("Order"). In the Order, the Court determined that the City of Colorado Springs and the City of Aurora's ("Cities") due process rights were violated in the course of the Board's denial of their permit applications. In addition, the Court determined the action of the Board was arbitrary and capricious and an abuse of discretion. This Court further ordered the Board to issue the three permits in question, subject to the conditions imposed by the federal permitting agencies.

The Board argues that the Court's Order deprived the parties, other than the Cities, their due process rights by denying the other parties an opportunity to rebut the findings in the Cities' revised wetlands mitigation plan.

The Board argues that reopening the record was required in order for it to consider the revised wetlands mitigation plan; that it was not a legitimate alternative to take official notice of the plan, without a chance for the other parties to respond.

The Board argues that even if it erred in deciding not to evaluate the Cities' revised mitigation plan, the remedy ordered by this Court, of directing the Board to issue the permits, is inappropriate. The Board contends that judicial review of an inferior tribunal's discretionary decision-making is limited to an analysis of whether that tribunal exceeded its jurisdiction or abused its discretion, and the court cannot fashion a remedy to cure a procedural defect. The Board contends that the proper remedy here would be a remand for further proceedings.

Conversely, the Cities argue that the Court was correct in its rulings contained in the Order. Specifically, the Cities contend that they were not asking the Board to reopen the hearing record to take further evidence of mitigation, but they wished the Board to take notice of requirements imposed on the Cities by federal agencies for mitigating wetlands injury. Furthermore, the Cities contend that the Court was within its discretion in ordering the County to issue the disputed permits.

THE COURT makes the following Conclusions of Law:

Although the Board attempts to rationalize its refusal to consider the mitigation requirements mandated by federal agencies as a move to protect due process rights, this Court is not convinced. The Court did not expect the

Board to reopen the hearing record concerning the specifics of the mitigation plan, but rather assumed the Board would balance its finding of inadequate mitigation against the newly required mitigation measures. The Court is of the opinion that the Board may take official notice of federal requirements without reopening the record as to the propriety of the specifics of the mitigation plan, especially since the other defendants who object to such a procedure were participants in the federal agency process that led to the plan. The only issue up for argument would be the requirements themselves, which should be easy to discern from federal documents. Therefore, the Court will not modify its findings of arbitrary and capricious or abuse of discretion.

A court may direct a government body to take a specific action, such as issuing a license, when the Court determines it would be futile to remand for re-determination. See *Buddy and Lloyd's Store No. 1, Inc. v. City Council,* 337 P.2d 389 (Colo. 1959). The wide discretion which is vested in a permitting authority in granting or denying permits is not to be construed as authority to establish a local public policy, either by express resolution or by secret agreement, contrary to state and federal law. Id. at 391-392.

However, in this case the Court concludes it is a better procedure to remand the decision to the Board for proceedings in conformance with this Court's orders. Relief under C.R.C.P. 106(a)(4) is limited to a determination of whether the Board exceeded its jurisdiction or abused its discretion. *Beaver Meadows v. Board of County Commissioners,* 709 P.2d 928 (Colo. 1985).

THEREFORE, THE COURT ORDERS:

On reconsideration, the Court vacates that portion of its previous Order requiring the Board to issue the Cities the permits. The permitting decision is remanded to the Board with directions to take official notice of the mitigation requirements imposed on the Cities by federal agencies. This Court's previous Order stands in all other respects and is a final judgment as defined in Rule 54(b), C.R.C.P.

DONE THIS 27 DAY OF JANUARY, 1993.

BY THE COURT:

/s/ Wm L Jones
DISTRICT JUDGE

CERTIFICATE OF MAILING

HENRY W. IPSEN
ATTORNEY AT LAW
1700 LINCOLN,
SUITE 4100
DENVER, CO 80203

JAMES R. FRITZE
ATTORNEY AT LAW
P.O. BOX 850
EAGLE, CO 81631

GREGORY L. JOHNSON
MARK T. PIFHER
ATTORNEYS AT LAW
104 S. CASCADE AVENUE,
#204
P.O. BOX 240
COLORADO SPRINGS, CO
80901-0240

JOHN W. DUNN
ATTORNEY AT LAW
108 SOUTH FRONTAGE
ROAD WEST
SUITE 204
P.O. BOX 2299
VAIL, CO 81658

WAYNE B. SCHROEDER
T. SHAUN SULLIVAN
ATTORNEYS AT LAW
1700 LINCOLN,
SUITE 3800
DENVER, CO 80203

LORI POTTER
SIERRA CLUB LEGAL
DEFENSE FUND
1631 GLENARM PLACE,
SUITE 300
DENVER, CO 80202

FRANCES M. GREEN
ATTORNEY AT LAW
1405 ARAPAHOE, #200
BOULDER, CO 80302

EDWARD P. SANDS
ATTORNEY AT LAW
MOUNTAIN PLAZA,
SUITE 201
201 WEST THIRD STREET
RIFLE, CO 81650

JOHN M. DINGESS
ATTORNEY AT LAW
7800 EAST UNION
AVENUE
SUITE 200
DENVER, CO 80237

The foregoing order was placed in the U.S. Mail, postage prepaid and affixed, addressed to the above parties on January 27, 1993.

/s/ Carol S. Martin

APPENDIX L

THE COURT OF APPEALS OF THE
STATE OF COLORADO

Case Number 93CA0386

ORDER

CITY OF COLORADO SPRINGS ET AL V EAGLE COUNTY ET AL

Upon consideration of the Petition for Rehearing filed by the Appellant Cross Appellee herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including January 17, 1995 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Davidson, J.

Jones, J.

Rothenberg, J.

DATED: December 15, 1994

APPENDIX M

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC765
CERTIORARI TO THE COLORADO COURT OF APPEALS, 93CA0386 & 93CA0412
DISTRICT COURT, EAGLE COUNTY, 88CV142

ORDER OF COURT
(Filed June 6, 1995)

CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, municipal corporations,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO; GEORGE A. GATES, JOHNETTE PHILLIPS, JAMES E. JOHNSON, JR., in their offical [sic] capacities as individual members of said Board; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, in its capacity as the permitting authority under § 24-65-101 *et seq.*, C.R.S.; THE EAGLE COUNTY PLANNING COMMISSION; MARK DONALDSON, ROBERT TETHER, ARLENE QUENON, ROBERT MORRIS, DONALD PRICE, in their offical [sic] capacities as individual members of said commission; THE COUNTY OF EAGLE, STATE OF COLORADO; HOLY CROSS WILDERNESS DEFENSE FUND; and VAIL VALLEY CONSOLIDATED WATER DISTRICT,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review

of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 5, 1995.

CHIEF JUSTICE ROVIRA and JUSTICE MULLARKEY would grant as to the following issues:

Whether the court of appeals erred in allowing a county, under the Colorado Land Use Act, § 24-65.1-101 *et seq.*, 10B C.R.S. (1988 & 1994 Supp.) (H.B. 1041), to veto a municipal water project located on federal lands.

Whether the court of appeals erred in finding that the county did not act arbitrarily and capriciously in denying the municipalities their requested land use permits.

(Seal)

Whether the court of appeals erred in ruling that Colorado home rule municipalities do not have standing to pursue a claim for the regulatory taking of property without just compensation.

cc: Mark T. Pifher
ANDERSON, GIANUNZIO, DUDE,
PIFHER & LEBEL, P.C.
104 S. Cascade Avenue, #204
P. O. Box 240
Colorado Springs, CO 80901-0240
Lori Potter
Munir Meghjee
SIERRA CLUB LEGAL DEFENSE FUND
1631 Glenarm Place, Suite 300
Denver, CO 80202

James R. Fritze, Esq.
Eagle County Attorney
P.O. Box 850
Eagle, Colorado 81631

John M. Dingess, Esq.
Duncan, Ostrander, Varnell & Dingess, P.C.
7800 East Union Avenue, #200
Denver, CO 80237

Henry W. Ipsen, Esq.
Holme, Roberts & Owen
1700 Lincoln, Suite 4100
Denver, Colorado 80203

Frances M. Green, Esq.
2260 Baseline, Suite 200
Boulder, Colorado 80302

Wayne B. Schroeder, Esq.
Grimshaw & Harring
One United Bank Center, #3800
1700 Lincoln Street
Denver, Colorado 80203

Honorable William L. Jones
Eagle County District Court
Eagle County Courthouse
605 East Chambers Road
P.O. Box 597

Clerk of the District Court
Eagle County District Court
Eagle County Courthouse
605 East Chambers Road
P.O. Box 597
Eagle, CO 81631

Patrick H. Stanford, Clerk
Colorado Court of Appeals

APPENDIX N

DISTRICT COURT, COUNTY OF EAGLE, STATE OF COLORADO

Civil Action No. 88CV142

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

CITY OF COLORADO SPRINGS AND
CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under § 24-65.1-101, *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;

10. COLORADO RIVER OUTFITTERS ASSOCIATION;
11. DIVISION OF WILDLIFE, STATE OF COLORADO;
12. EAGLE COUNTY SHERIFF, in his official capacity;
13. HOLY CROSS WILDERNESS DEFENSE FUND;
14. JAMES FRANKLIN LAMONT;
15. RED CLIFF WATER AND SANITATION DISTRICT;
16. TOWN OF EAGLE, COLORADO;
17. TOWN OF GYPSUM, COLORADO;
18. TOWN OF MINTURN, COLORADO;
19. TOWN OF REDCLIFF, COLORADO;
20. TOWN OF VAIL, COLORADO;
21. UPPER EAGLE REGIONAL WATER AUTHORITY;
22. UPPER EAGLE VALLEY SANITATION DISTRICT;
23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
24. VAIL ASSOCIATES, INC.; and
25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

---

* * *

C. THE BOARD HAS ATTEMPTED TO REGULATE AREAS PRE-EMPTED BY FEDERAL LAW.

Eagle County cannot apply its 1041 regulations to this permitting process because it is pre-empted from so doing by virtue of federal law. As previously indicated, the Cities' project is to be located entirely upon federal

Forest Service lands. The Forest Service Management Plan (Record, Vol. I, Exh. A-11) specifically states that the White River National Forest is for *multiple use*. This is consistent with the language of the Federal Land Policy Management Act (FLPMA) 43 U.S.C.A. § 1701, § 1732 and the language of the National Forest Management Act, 16 U.S.C.A. § 1600, *et seq.*, (West 1985) both of which encourage multiple use, including water resource development.

Pursuant to federal requirements under the National Environmental Policy Act (NEPA), 42 U.S.C.A. § 4321, *et seq.*, (West 1977) the Forest Service performed an environmental analysis which lead to a number of public hearings, the submission of numerous written comments, and the eventual issuance of a Final Environmental Impact Statement (FEIS). (Record, Vol. I, Exh. A-l.) Eagle County took a very active roll [sic] in this environmental review process (Appendix J, pp. 14-17, Record, Vol. I, Exh. A-l), and had numerous opportunities to place its concerns of record and have them addressed by the federal agencies. The Cities also obtained a FLPMA permit (Appendix C), which permit provided the Cities with the necessary Forest Service easement. As previously stated, this permit contained numerous mitigation measures designed to ensure that the project was constructed and operated in an environmentally sound fashion. In addition, the Cities received a Section 404 Permit from the U.S. Corps of Engineers (Appendix D), which permit also embodied numerous conditions addressing various environmental issues including aesthetics, water quality, and wetlands preservation. As to the latter concern, the Corps' permit specifically stated that the Cities had to devise a plan to "prevent the loss of wetlands". (Appendix D, p. 5.) Any

mitigation utilized in conjunction with such plan "shall not cause more than minimal visual intrusion to the wilderness area, and shall not have significant environmental impacts". (Appendix D, p. 3.) It should also be noted that the Corps found the alternative being permitted to be consistent with §§ 101, 401, and 404 of the Clean Water Act, NEPA, the Endangered Species Act, the Fish and Wildlife Coordination Act, policies concerning scenic and recreational values, and policies concerning energy conservation. (Appendix D, pp. 4-5.) Nevertheless, despite the above federal approvals, the numerous protective conditions contained in such approvals, Eagle County's participation in the federal process, and the location of the project on federal lands, the Board made a contrary finding as to the acceptability of the project and *denied* the requested local land use.

The federal pre-emption doctrine has been succinctly stated by the court in *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577, 592 (1987):

> State law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [Citations deleted.] If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, [citation deleted] or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. [Citations deleted.]

This is the same analysis employed by the Colorado Supreme Court in *Brubaker v. Board of County Commissioners*, 652 P.2d 1050, 1055 (Colo.1982). Both of these decisions inexorably lead to the conclusion that the Board could not deny the permits being sought by the Cities.

In *Brubaker*, plaintiff sought from the Board of County Commissioners a special use permit for purposes of conducting certain mining operations which had received federal approval. The Board denied the permit application on the grounds that the activity was inconsistent with the long-range plans of the County and incompatible with uses on surrounding properties. However, the Colorado Supreme Court held that such a denial was pre-empted by federal law as it stood as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Brubaker v. Board of County Commissioners*, 652 P.2d at 1055.

> This activity has been subjected to the necessary federal review and approvals, but the Board asserts that it may now deny the appellants their right to use the land in this manner. The Board seeks not merely to supplement the federal scheme, but to prohibit the very activities contemplated and authorized by federal law. Such a veto power is not consistent with the Supremacy Clause.

Brubaker v. Board of County Commissioners, 652 P.2d at 1056. Though acknowledging that it may be possible to impose "reasonable" environmental conditions upon such an activity, the Court chastised the County for attempting not to regulate, but to "prohibit" federally

authorized activities. *Brubaker v. Board of County Commissioners,* 652 P.2d at 1059.

In so holding, the *Brubaker* court cited with approval the decision of the Ninth Circuit in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979) aff'd mem. 445 U.S. 947 (1980), wherein Gulf sought to secure from the county an open space permit prior to undertaking its mineral exploration activities on federal lands within the county. In holding that the governing federal legislation preempted such county regulation, as there existed an impermissible conflict between the two bodies of law, the court stated:

> Despite this extensive federal scheme reflecting concern for the local environment as well as development of the nation's resources, Ventura demands a right of final approval. Ventura seeks to prohibit further activity by Gulf until it secures an Open Space Use Permit which may be issued on whatever conditions Ventura determines appropriate, or which may never be issued at all. The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.

Ventura County v. Gulf Oil Corp., 601 F.2d at 1084. See also: *Federal Power Commission v. Oregon,* 349 U.S. 435 (1955). The Ventura court then continued:

> Finally, we are reassured in the correctness of our decision by policy considerations implicitly reflected in the structure and operation of the Mineral Lands Leasing Act of 1920 and the National Environmental Policy Act of 1969 (42

> U.S.C. §§ 4321, *et seq.*). As Ventura recognized in filing its second amended complaint, the National Environmental Protection Act (NEPA) and the guidelines, regulations, and executive orders issued in pursuance of that act, mandate extensive federal consideration and federal-local cooperation concerning the local, environmental impact of federal action under the Mineral Lands Leasing Act. If federal officials fail to comply with these requirements, Ventura has a remedy against those officials.

Ventura County v. Gulf Oil Corp., 601 F.2d at 1086. Similarly, in the present instance, the County seeks to prohibit the federally authorized activity, having denied the requested permits. It does so even though the NEPA process has been invoked and the County has participated therein.[16] Such conduct is contrary to the holdings in both *Brubaker*, 652 P.2d 1050 (Colo.1982) and *Ventura County*, 601 F.2d 1080 (9th Cir. 1979) aff'd mem. 445 U.S. 947 (1980).

The recent decision by the United States Supreme Court in *California Coastal Commission v. Granite Rock*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577, is consistent with the above holdings. Although the sharply divided Court ruled that reasonable state environmental regulations covering forest service land were not per se pre-empted by federal law, the five to four majority described this

---

[16] The Board did note an indication of "deficiencies in the Environmental Impact Statement," (Appendix F, p. 7, Finding No. 12) without tying their finding to any local criteria. If the Board was dissatisfied with the EIS process, it could have sought review thereof. Instead, it sat on its hands.

holding as a "narrow" rejection of a "purely facial challenge." *Granite Rock,* L.Ed.2d at 591, 599. In *Granite Rock,* the State had not participated in the Federal permit process. Moreover, Granite Rock had not even applied for a State permit, arguing that there was no possible set of conditions that the State could place on its permit that would not conflict with federal law. It therefore had " . . . lost the possibility of making this argument [prohibition] in this litigation". *Granite Rock,* L.Ed.2d at 596.

Significantly, the majority decision assumed without deciding, an assumption deemed "correct" in the dissent by Justices White and Scalia and consistent with the decision in *Ventura County,* that "the combination of the NFMA and the FLPMA pre-empt the extension of state land use plans . . . in national forest lands". *Granite Rock,* L.Ed.2d at 594. The Court went on to stress that the State was not asking Granite Rock to comply with a *local* land use plan or zoning ordinance, but rather with the regulations of a *State* Commission concerned with "compliance with the environmental criteria in the Coastal Act itself". *Granite Rock,* L.Ed.2d at 595 n.2. The Court accepted the State's assertion that it did not seek to prohibit the activity [mining], but only to regulate the environmental aspects of the activity. *Granite Rock,* L.Ed.2d at 595. The Court placed emphasis on the State's assertion that the federal legislation did not pre-empt state environmental regulation of federal land *"unless the regulation prohibits mining altogether"* (Court's emphasis) and cautioned that there could be "state environmental regulation so severe that a particular land use would become commercially impracticable". *Granite Rock,* L.Ed.2d at 595. However, since Granite Rock had not applied for the state permit, it

was unable to show the conditions which the State would have placed upon its permit. Given the "as yet unidentified conflicts with the federal scheme" and the "barren record," the Court cautiously accepted the possibility that the State might impose reasonable environmental regulations. *Granite Rock,* L.Ed.2d at 600.

The facts of the instant case are clearly different than those presented in *Granite Rock,* and are indeed on point with those in the *Brubaker,* 652 P.2d 1050 (Colo.1982) decision. In the present case, the County actively participated in the federal process. To the extent the County is now seeking to raise environmental concerns they were specifically addressed in that process.[17] Further, unlike

---

[17] Even environmental concerns, assuming they can be addressed by the local entity, cannot be of a general or generic character or they will run a-foul of the pre-emption doctrine.

> Without deciding to what extent the City might impose additional environmental restrictions on the facility in exercising its traditional land use authority, I find the denial of the permit based on generalized environmental or health and safety concerns, where the EPA has already found the health, safety, and environmental risk to be acceptable, is impermissible under the doctrine of federal pre-emption. Allowing local governments to impose a permit requirement and then to deny the permit on unspecified environmental grounds, without articulating specific health or safety concerns or setting forth particular environmental requirements which the facility must meet, surely frustrates congressional intent behind the whole research, development, and demonstration program.

Ogden Environmental Services v. City of San Diego, 687 F.Supp. 1436, 1448 (S.D. CA 1988). Just such inadequate articulation is in evidence in this case.

Granite Rock, the Cities applied for the local permit, and there is now a record showing the reasons for rejection by the local authority, i.e. a record establishing the irreconcilable conflict. Indeed, this Court is now faced with a *local* entity attempting to enforce what has been determined by the Tenth Circuit to be *local* regulations, *City and County of Denver v. Bergland*, 695 F.2d 465, 485 (10th Cir. 1982), and to either absolutely *prohibit* the activity, in the case of the Board, or to impose conditions so severe as to make the Project commercially impracticable, in the case of the Planning Commission. Thus, not only is the *state* regulatory scheme required by *Granite Rock* absent, but even if regulations in question were being imposed by the state, they would not pass the "reasonableness" test.

In addition, the County is in fact attempting to impose "land use regulations," not environmental regulations. This includes those regulations adopted under § 24-65.1-101, *et seq.*, 10B C.R.S. (1988), which have been characterized by the legislature as "land use planning" tools and codified as part of the land use planning statutes.[18] See § 24-65.1-101(1)(c), 10BC.R.S. (1988). The "situation in the present case is the very result feared by the dissenting opinion in *Granite Rock*, i.e. "duplicative" processes wherein a local regulator has given itself final

---

[18] In *City and County of Denver v. Bergland*, 517 F.Supp. 155, 174 n.18 (D.C. CO 1981), even Grand County seemingly admitted that its 1041 regulations fell within the category of "police power regulations involving land use, construction permits and zoning," i.e. land use regulation.

authority to determine how federal lands are to be used. *Granite Rock,* L.Ed.2d at 602.

Indeed, J. Scalia ends his opinion with the following observation:

> If environmental control is, as California now assures us, its limited objective in this case, then *it must simply achieve that objective by means other than a land use control scheme.* If and when it does so, we may have occasion to decide (as we need not today) whether state environmental controls are also pre-empted. More likely, however, the question will not arise in the future, as it has not arisen in the past, because of the Federal Governments voluntary accommodation of state environmental concerns – an accommodation that could not occur here only because California neglected to participate in the proceedings.

Not only has the above-referenced "accommodation" occurred in this instance, but the County persists in its attempt to impose its own controls through its local land use plan. This Court cannot allow such an outcome. *Brubaker v. Board of County Commissioners, supra,* is the controlling law in Colorado and its analysis dictates the result in this litigation. Federal pre-emption must be found to exist.

* * *

DISTRICT COURT, COUNTY OF EAGLE, STATE OF COLORADO

Civil Action No. 88CV142

MEMORANDUM BRIEF IN RESPONSE TO EAGLE COUNTY'S MOTION TO DISMISS

CITY OF COLORADO SPRINGS AND
CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under § 24-65.1-101, *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;

10. COLORADO RIVER OUTFITTERS ASSOCIATION;

11. DIVISION OF WILDLIFE, STATE OF COLORADO;

12. EAGLE COUNTY SHERIFF, in his official capacity;

13. HOLY CROSS WILDERNESS DEFENSE FUND;

14. JAMES FRANKLIN LAMONT;

15. RED CLIFF WATER AND SANITATION DISTRICT;

16. TOWN OF EAGLE, COLORADO;

17. TOWN OF GYPSUM, COLORADO;

18. TOWN OF MINTURN, COLORADO;

19. TOWN OF REDCLIFF, COLORADO;

20. TOWN OF VAIL, COLORADO;

21. UPPER EAGLE REGIONAL WATER AUTHORITY;

22. UPPER EAGLE VALLEY SANITATION DISTRICT;

23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;

24. VAIL ASSOCIATES, INC.; and

25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

---

* * *

I. PLAINTIFFS HAVE STANDING TO ASSERT THEIR SIXTH AND TWELFTH CLAIMS FOR RELIEF AS HOME RULE MUNICIPALITIES IN THEIR CAPACITY AS OWNERS OF CERTAIN DECREED CONDITIONAL WATER RIGHTS.

A. The "per se" exclusionary rule on standing, as developed by the federal courts, should not apply.

Defendants assert that Plaintiffs have no standing to bring the Sixth and Twelfth Claims. Defendants' assertion is not based upon the standing test announced in *Wimberly v. Ettenberg*, 194 Colo. 163, 470 P.2d 535 (1979), i.e. "[t]he proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly, supra* at 168. Rather, Defendants assert that the mere identity of Plaintiffs is an absolute bar to standing. That is to say, Plaintiffs are precluded "per se" from bringing such claims.

Defendants rely entirely on a line of cases which, they claim, hold that a municipality can never have standing to sue the state of which it is a creature or the political subdivisions of that state. Defendants then assert that the Colorado Supreme Court has recently adopted this position in a footnote (dicta) to *Town of Orchard City v. Board of County Commissioners of Delta County*, 751 P.2d 1003 (Colo. 1988). However, a close examination of both the applicable federal and Colorado cases upon the subject inexorably lead to a different conclusion.

One must start such an examination with a review of Justice White's dissent from the denial of certiorari in

City of Lake Tahoe v. California Tahoe Regional Planning Agency, 449 U.S. 1039, 66 L.Ed.2d 502, 101 S.Ct. 619 (1980) which is also cited by the Colorado Supreme Court in the *Orchard City* footnote quoted by Defendants. In that dissent, Justice White was critical of what he termed the "per se rule" of no standing as cited by Defendants herein, finding it to be inconsistent with the decision in *Board of Education v. Allen*, 392 U.S. 236 (1968). In addition, he referenced *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979), upon which a conflicting line of cases has developed.

The *Rogers* court held that while some of the language in the opinions cited by Defendants is indeed broad enough to seemingly support Defendants' argument, said decisions, properly interpreted, do not support the conclusions advocated by Defendants. *Rogers v. Brockette*, 588 F.2d at 1067-1071. As explained by the *Rogers* court, the line of cases relied upon by the Defendants are the descendants of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L.Ed 629 (1919) wherein New Hampshire was prohibited from modifying a charter that the colonial government had issued to Dartmouth College by virtue of the contract clause to the U.S. Constitution. In the famous dicta to that decision, Chief Justice Marshall sought to avoid a situation wherein citizens of the state could claim they had a "contract" with the state, because such an interpretation would bar the state from impairing any such contract. This would leave a state practically unable to legislate or allocate political power within its subdivisions. Justice Marshall's solution was to enunciate the principle that certain guarantees of the U.S. Constitution should not be

interpreted to interfere with a state's control over the allocation of its political powers.[1]

In *Rogers*, Judge Goldberg also described *Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed 937 (1923), which is cited by Defendants, as "typical" of the series of cases following *Dartmouth*. *Rogers v. Brockette*, 588 F.2d at 1067. In that case, the state modified a charter that it had previously given to the municipality. In holding that the municipality had no standing, the Court extensively quoted from *Hunter v. Pittsburgh*, 207 U.S. 161, 178, 179, 52 L.Ed. 151, 159, 160, 28 S.Ct. 40 (1907), which is "usually considered the leading example." *Rogers v. Brockette*, 588 F.2d at 1067.[2] However, when these cases were decided,

---

[1] The line of cases that followed *Dartmouth* were faithful to Justice Marshall's holding that the Constitution does not interfere with the internal political organization of states. In each case the Court reviewed the merits of the claim, and determined that the municipality had no right under the particular constitutional provisions it invoked. Although these decisions were framed in terms of standing, the decisions are actually substantive interpretations of the constitutional provisions involved in those cases. *Rogers v. Brockette*, 588 F.2d at 1070.

[2] The Hunter case, which involved a consolidation of the cities of Allegheny and Pittsburgh, contains a classic description of the unlimited power of states over municipalities. Its rationale is that municipal corporations, as "creatures of the state," exist by virtue of legislative enactments and can at any time be terminated by the State. Other decisions in this line of cases speak of a theoretical unity of interests, intramural disputes between political subdivisions charged with the same statewide goal, and the incongruity of a subordinate local agency suing its administrative and supervisory superior over the state allocation of political power. The logic of these decisions is that the boundaries of a municipality were given by the State and a municipality has no property right to those boundaries as

"standing" meant something different from what it means today. *Rogers v. Brockette*, 588 F.2d at 1070. The old legal standing test went to the merits of the case. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). However, by resolving these substantive issues under the rubric of standing principles, these decisions have been misinterpreted as a broad denial of access to the courts. As a result, substantive issues have become distorted and parties have been deprived of the full consideration they deserved. *Municipal Corporation Standing To Sue The State: Rogers v. Brockette*, 93 Harv.L.Rev. 586 at 590, 591 (1980).[3] Plaintiffs submit that the Supreme Court implicitly acknowledged, in *Hunter v. Pittsburgh*, that a municipality can raise the claim that its "private" contract and property rights have been

---

against its creator. Cf: *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2nd Cir. 1968) (municipality is a person within meaning of Fourteenth Amendment); *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978).

[3] The existing degree of confusion is illustrated by the fact that *Rogers v. Brockette* is confirmed by the same line of cases cited by Defendants. As Judge Goldberg points out, the *Hunter* court said:

> It will be observed that, in describing the absolute power of the state over the property of municipal corporations, *we have not extended it beyond property held or used for governmental purposes.* Such corporations are sometimes authorized to hold and do hold property *for the same purposes that property is held by private corporations or individuals* . . . it has been held that, as to the latter class of property, the legislature is not omnipotent. (emphasis added) 28 S.Ct. at 47.

Rogers v. Brockette, 588 F.2d at 1069.

impaired. Such is explicitly stated by Justice Goldberg in *Rogers v. Brockette*, 588 F.2d at 1069, 1070.

The Supreme Court subsequently discussed its prior decisions in this area in *Gomillion v. Lightfoot*, 364 U.S. 339, 5 L.Ed. 110, 81 S.Ct. 125 (1960). While recognizing that the numerous decisions dealing with the creation of municipalities and with taxation clearly state that the Due Process Clause affords no immunity against "mere inequalities in tax burdens . . . as an indirect consequence of a State's exercise of its political powers", the Court noted that the *Hunter* opinion itself "intimates that a state legislature may not be omnipotent even as to the disposition of some types of property owned by municipal corporations." *Gomillion, supra*, 5 L.Ed. at 114 and 115. The Court warned that "exalting" the State's political power to an absolute would "misconceive the reach and rule" of *Hunter* and related cases relied upon by Defendants and stated:

> . . . a correct reading of this seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.

Gomillion v. Lightfoot, 5 L.Ed.2d at 114-115.

Thus, as noted above, a number of courts have called the "per se rule" into question. This includes one of the cases cited by Defendants, *U.S. v. State of Alabama*, 791 F.2d 1450 (4th Cir. 1986). The court in *U.S. State of Alabama* held that the per se rule did not apply in that circuit,

but went on to hold that *"[i]n the instant case, . . .* ASU . . . may not raise a Fourteenth Amendment claim . . . ." (emphasis added). In that case, Alabama State University was attempting to realign itself as a plaintiff in a case against the State Board of Education. Nevertheless, it is significant that the *U.S. v. Alabama* court upheld the rights of individual intervenors to maintain the action against the Board of Education. This is essentially the position taken by the Colorado Supreme Court in the *Orchard City* case cited above, where individual citizens were allowed to pursue the tax dispute against the county.

Unless this Court wishes to add individual citizens of Colorado Springs and Aurora as Plaintiffs to this action, the present Plaintiffs are arguably the only parties that may present the constitutional issues which are correctly invoked in the present case. If defendants succeed in advancing their distorted view of standing, the Defendants would be insulated from scrutiny. However, a careful review of the issues in the instant case reveals that the cases cited by Defendants are not dispositive of this dispute, as a "per se" rule should not apply, and, in fact, has never been applied by the Colorado courts.

* * *

C. Plaintiffs have standing in their proprietary capacity.

Further, in the Sixth and Twelfth Claims for Relief, Plaintiffs are before this Court in a dual capacity, i.e. in their governmental capacity and in their proprietary capacity as the owners of decreed conditional water

rights. Defendants' argument improperly concentrates exclusively on the first capacity. However,

> . . . it is well settled that a city in operating a water works system acts in its proprietary or business, and not in its political or governmental capacity, and in so acting is governed by the same rules that apply to a private corporation.

County of Larimer v. City of Fort Collins, 68 Colo. 364, 367, 189 P. 929, 930 (1920). Although the distinction between "governmental" and "proprietary" capacity has been criticized and/or abolished for liability purposes, *Clark v. Town of Estes Park,* 686 P.2d 777 (Colo. 1984), the Colorado Supreme Court (en banc) has reaffirmed the distinction in municipal water supply cases as recently as 1985. *Denver v. Colorado River Water Conservation District,* 696 P.2d 730 (Colo. 1985).

The "per se" rule only makes sense where the cases deal with deliberate allocations of political authority between the state and its political subdivisions. None of the rationale about "creatures of the state" is relevant where, as here, the municipality is acting in a proprietary capacity in the clearest sense of that distinction.[5]

---

[5] It cannot be forgotten that Plaintiffs are acting as water utilities in the development of those water rights for which county permits are being sought. It is generally recognized that public utilities possess constitutional due process rights. *See: Long Island Lighting Co. v. Cuomo,* 666 F.Supp. 370 (N.D. N.Y. 1987); *Potomac Elec. Power v. Dist. of Columbia Gov.,* 651 F.Supp. 907 (D. D.C. 1986).

D. The "per se" exclusionary rule on standing does not apply to Colorado home rule municipalities.

In addition, the "creature of the state" rationale can never apply to home rule municipalities in the State of Colorado. The home rule provisions of the Colorado Constitution provide that Plaintiffs are no longer creatures of the state legislature but derive their powers directly from the Colorado Constitution.

> The very essence of a "Home Rule City" is embodied in the constitutional mandate that in its local and municipal affairs the City has full, complete and exclusive authority. The legislature is powerless to change this essential concept of home rule.

Four-County Metropolitan Capital Improvement District v. Board of County Commissioners, 149 Colo. 284, 304, 369 P.2d 67 (1962). The language found in *Hunter* and *Trenton* allowing the state "at its pleasure" to "modify or withdraw all such powers", to "take without compensation such property", "repeal the charter, and destroy the corporation" is simply not relevant.

In fact, the Colorado Supreme Court has recently ruled that home rule cities have standing to challenge the validity of state statutes under certain circumstances. In *Denver Urban Renewal Authority v. Byrne,* 618 P.2d 1374 (Colo. 1980), the Court reviewed the rationale of the per se rule, noting a number of cases which held that political subdivisions of the state exist only "for the convenient administration of the state government, created to carry out the will of the state." The Court harmonized this rule with the standing rule in *Wimberly v. Ettenberg supra,* by

reasoning that while political subdivisions of the state may have suffered an injury, the "difficult question is whether a legally protected interest is implicated." *Denver Urban Renewal Authority v. Byrne,* 618 P.2d at 1380. The Court ruled that the Colorado Constitution confers a legally protected interest in local concerns upon a home rule city which is not inferior to the General Assembly. *Denver Urban Renewal Authority v. Byrne,* 618 P.2d at 1381. In so holding, the Court quoted *Four-County, supra:*

> In numerous opinions handed down by this court extended over a period of fifty years, it has been made perfectly clear that when the people adopted Article XX they conferred *every power* theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs. (emphasis in original.) 360 P.2d at 72.

The result does not change when the issue is one of statewide concern. Although Plaintiffs maintain in their Second and Third Claims for Relief that the activities in issue are matters of local concern, Plaintiffs would still have standing if the issue was held to be one of statewide concern. In *City of Colorado Springs v. State of Colorado,* 626 P.2d 1122 (Colo. 1981), the City was found to have standing to argue constitutional violations, the Court holding that a matter of statewide concern (establishment of firemen's pension plans) was a local matter to the extent to which a home rule city must budget, assess and collect taxes to provide financial support for the plan. "To hold that no injury in fact would result to the city's constitutionally protected interests . . . would be to ignore realities of local government." *City of Colorado Springs v. State,* 626 P.2d at 1127. Similarly, in the present instance, the

development and use of the Cities water rights involves the exercise of purely local prerogatives which must be respected.

* * *

COURT OF APPEALS, STATE OF COLORADO

Case No. ___

NOTICE OF APPEAL

DISTRICT COURT, COUNTY OF EAGLE,
STATE OF COLORADO Civil Action No. 88CV142,
Judge William L. Jones

CITY OF COLORADO SPRINGS
AND CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs-Appellees,

v.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under § 24-65.1-101 *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;

9. COLORADO COUNCIL OF TROUT UNLIMITED;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;
11. EAGLE COUNTY SHERIFF; in his official capacity;
12. HOLY CROSS WILDERNESS DEFENSE FUND;
13. RED CLIFF WATER AND SANITATION DISTRICT;
14. TOWN OF EAGLE, COLORADO;
15. TOWN OF GYPSUM, COLORADO;
16. TOWN OF MINTURN, COLORADO;
17. TOWN OF REDCLIFF, COLORADO;
18. TOWN OF VAIL, COLORADO;
19. UPPER EAGLE REGIONAL WATER AUTHORITY;
20. UPPER EAGLE VALLEY SANITATION DISTRICT;
21. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
22. VAIL ASSOCIATES, INC.; and
23. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants-Appellants.

---

* * *

5. Whether the Board is prohibited on federal pre-emption grounds from regulating federally-approved activities on U.S. Forest Service lands in order to mitigate or reduce their environmental impacts, and whether the Court's invalidation of the Board's findings numbered I(6, 10, 19), II(14, 15), III(A) (1,2), III(B)(1, 2), IV(1, 2) on that basis was proper.

* * *

COURT OF APPEALS, STATE OF COLORADO

Case No. 93CA386

NOTICE OF CROSS-APPEAL

CITY OF COLORADO SPRINGS
AND CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs-Appellees/Cross-Appellants,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under § 24-65.1-101 *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;
11. EAGLE COUNTY SHERIFF, in his official capacity;

12. HOLY CROSS WILDERNESS DEFENSE FUND;
13. RED CLIFF WATER AND SANITATION DISTRICT;
14. TOWN OF EAGLE, COLORADO;
15. TOWN OF GYPSUM, COLORADO;
16. TOWN OF MINTURN, COLORADO;
17. TOWN OF REDCLIFF, COLORADO;
18. TOWN OF VAIL, COLORADO;
19. UPPER EAGLE REGIONAL WATER AUTHORITY;
20. UPPER EAGLE VALLEY SANITATION DISTRICT;
21. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
22. VAIL ASSOCIATES, INC.; and
23. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants-Appellants.

This cross-appeal is initiated by Plaintiffs-Appellees/Cross-Appellants, City of Colorado Springs and City of Aurora, Colorado home rule municipal corporations.

* * *

II. ISSUES TO BE RAISED ON APPEAL

1. Are the Cities "citizens" for purposes of the Fifth and Fourteenth Amendments of the U.S. Constitution, with standing to pursue alleged due process violations, including the taking of property without just compensation?

* * *

COLORADO COURT OF APPEALS Tr. Ct. No. 88CV142

Case No. 93 CA 386 and 93 CA 412

COMBINED ANSWER AND REPLY BRIEF OF PLAINTIFF-APPELLANTS, CROSS-APPELLANTS, THE CITIES OF AURORA AND COLORADO SPRINGS

CITY OF COLORADO SPRINGS AND
CITY OF AURORA,
Colorado municipal corporations,

Plaintiffs-Appellants-Cross-Appellees,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO; GEORGE A. GATES, JOHNETTE PHILLIPS, JAMES E. JOHNSON, JR., in their official capacities as individual members of said Board; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under §24-65.1-101 *et seq.*, C.R.S.; THE EAGLE COUNTY PLANNING COMMISSION; MARK DONALDSON, ROBERT TETHER, ARLENE QUENON, ROBERT MORRIS, DONALD PRICE, in their official capacities as individual members of said Commission; THE COUNTY OF EAGLE, STATE OF COLORADO; HOLY CROSS WILDERNESS DEFENSE FUND; and VAIL VALLEY CONSOLIDATED WATER DISTRICT.

Defendants-Appellees-Cross-Appellants.

ANDERSON, JOHNSON &
GIANUNZIO, P.C.
Mark T. Pifher, #12629
Jonathan C. Dehmlow, #23454
Stephen J. Lebel, #8367
104 S. Cascade Ave., Suite 204
Colo. Spgs., CO 80903
(719) 632-3545

ATTORNEYS FOR PLAINTIFFS-APPELLANTS/CROSS-APPELLEES, CITY OF COLORADO SPRINGS AND CITY OF AURORA

* * *

B. THE COUNTY REGULATIONS WERE PREEMPTED UNDER STATE AND FEDERAL LAW.

1. The County Land Use Controls Were Pre-Empted Under Federal Law.

The District Court, relying upon the decisions in *Brubaker v. Board of County Comm'rs, El Paso County,* 652 P.2d 1050 (Colo. 1982) and *California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572 (1987), correctly concluded that the County could not impose land use regulations upon this project, which is located entirely on federal lands.[12] In arguing to the contrary, defendants once again misconstrue both the operative facts and the law.

---

[12] Though Defendants attempt to characterize many of the local regulations as "environmental" in nature, they are in fact land use determinations. The "quality and quantity of the river rafting experience" is a land use decision, i.e., will the County have water diversions or aquatic playgrounds. Similarly, regulation of the area as a "wilderness" is a land use choice. Though

Typical of the Fund's outright misrepresentation of the facts is its assertion on page 15 of its Brief that the federal permits obtained by the Cities indicated that a local 1041 permit was required. The permit actually provides:

> Eagle County and other Counties advise the Forest Service that various permits are needed. These permits would include:
>
> (2) Permits pursuant to Eagle County's or other Counties H.B.-1041 process.

Hence, the Forest Service merely acknowledged that it had been "advised" by the County that, in the opinion of the County, a 1041 permit was necessary. This certainly falls far short of a federal requirement that such a local permit be obtained.

Defendants also conveniently choose to *ignore* certain significant facts. As previously indicated, the City's project is to be located entirely upon federal Forest Service lands. The Forest Service Management Plan (Record Volume I, Exhibit A-11) specifically states that the White River National Forest is for *multiple use*. This is consistent

---

water quality can be characterized as an environmental concern, water rights are an individual property interest in Colorado, and protection thereof from alleged degradation is thus more akin to land use control. Further, the "nuisance factors" referenced in the Board's findings have been historically characterized as matters within the ambit of the local "zoning" authority. *See Robinson Brick Co. v. Luthi*, 115 Colo. 106, 111, 169 P.2d 171 (1946); *C&M Sand and Gravel v. Board of County Comm'rs*, 673 P.2d 1013, 1017 (Colo. App. 1983). *See also* Finding III(A)(1), (B)(1), Addendum 14 at p. 169, 170.

with the language of the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. §1701, 1732 (1986), the National Forest Management Act, 16 U.S.C. §1600 (1985), *et seq.*, the Organic Act of 1897, 16 U.S.C. §481 (1985), and the Multiple Use Sustained Yield Act, 16 U.S.C. §528 (1985), *et seq.* Included within the uses encouraged by each of these Acts is water resource development. For example, the Organic Act specifically provides:

> All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the state wherein such national forests are situated or under the laws of the United States and the rules and regulations established thereunder.

16 U.S.C. §481.[13]

Further, pursuant to federal requirements under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 (1977 and 1993 Supp.), *et seq.*, the Forest Service performed an environmental analysis which lead to a number of public hearings, the submission of numerous written comments, and the eventual issuance of a final environmental impact statement (FEIS). (Record Volume

---

[13] As noted in *United States v. City and County of Denver*, 656 P.2d 1, 23 (Colo. 1982):

> The Supreme Court in *United States v. New Mexico, supra*, emphasized that Congress intended to provide large quantities of water for the economic development of the West when it passed the Organic Act of 1897.

See also U.S. v. Jesse, 744 P.2d 491, 502 (Colo. 1987) (Organic Act provides for and contemplates the diversion of water by private parties within the national forests in accordance with state law).

I, Exhibit A-1.) Eagle County and the other defendants took an active role in this environmental review process, Addendum 35, pp. 393-395; Record Volume I, Exhibit A-1), and had numerous opportunities to place their concerns of record in order to have them addressed by the federal agencies.[14]

Defendants also ignore the fact that the Cities obtained a FLPMA permit (Addendum 11) which sets forth numerous mitigation measures designed to ensure that the project was constructed and operated in an environmentally sound fashion. In addition, the Cities applied for and received a §404 permit (33 U.S.C. §1344 (1986)) from the Corps of Engineers. Addendum 12. This permit embodied conditions addressing various environmental issues including aesthetics, water quality, and wetlands preservation. Supplementing the "no loss" of wetlands provision, was a requirement that any mitigation utilized in conjunction with the wetlands mitigation plan "shall not cause more than minimal visual intrusion to the wilderness area, and shall not have significant environmental impacts." Addendum 12, p. 127. The

---

[14] The County did note an indication of "deficiencies in the Environmental Impact Statement," (Addendum 14, p.168), without tying this finding to any local criteria. If the County was dissatisfied with the EIS process, it could have sought review thereof. It failed to do so. Further, to the extent the County and the remaining defendants claim that the federal agencies used different standards than applied by the County, the only applicable county criteria references "no significant deterioration of wetlands." To argue that the Forest Service and Corps of Engineers did not address this basic issue under their extensive federal regulatory requirements is patently ridiculous. *See, e.g.*, 33 C.F.R. Part 320, 40 C.F.R. Part 230.

Corps specifically found the permitted alternative to be consistent with §§101, 401 and 404 of the Clean Water Act, NEPA, the Endangered Species Act, the Fish and Wildlife Coordination Act, policies concerning scenic and recreational values, and policies concerning energy conservation. Addendum 12, pp. 133-134.

Nevertheless, despite the above approvals and the numerous protective conditions contained therein, despite defendants' participation in the federal process, and despite the location of the project on federal lands, the requested local land use permits were denied.[15] With the above factual background in mind, a closer analysis of the decisions in *Brubaker* and *Granite Rock, supra,* is required.

(a) The district court correctly relied upon the Brubaker decision.

In *Brubaker,* plaintiffs sought from the County Board a special use permit for purposes of conducting certain mining operations which had previously received federal approval. The County denied the application. The Colorado Supreme Court held that such a denial was pre-

---

[15] Regulations adopted under C.R.S. §24-65.1-101, *et seq.* (1990), have been characterized by the legislature as "land use planning" tools and codified as part of the land use planning statutes. *See* C.R.S. §24-65.1-101(1)(c) (1990). In *City and County of Denver v. Bergland,* 517 F.Supp. 155, 174, n. 18 (D. Colo. 1981), even the County seemingly admitted that its 1041 regulations fell within the category of "police power regulations involving land use, construction permits and zoning," i.e., land use regulation.

empted by federal law, as it stood as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Brubaker,* 652 P.2d at 1055. Simply stated, "[S]uch *a veto power* is not consistent with the Supremacy Clause." (Emphasis added.) *Id.* at 1056. In so holding, the *Brubaker* court cited with approval the decision of the Ninth Circuit in *Ventura County v. Gulf Oil Corp.,* 601 F.2d 1080 (9th Cir. 1979) aff'd mem 445 U.S. 947 (1980), wherein Gulf sought to secure from the County an open space permit prior to undertaking its mineral exploration activities on federal lands within the County. *Id.* at 1056. In holding that the governing federal legislation pre-empted such County regulation due to an impermissible conflict between the two bodies of law, the Ninth Circuit observed:

> Despite this extensive federal scheme reflecting concern for the local environment as well as development of the nation's resources, Ventura demands a right of final approval. Ventura seeks to prohibit further activity by Gulf until it secures an Open Space Use Permit which may be issued on whatever conditions Ventura determines appropriate, or which may never be issued at all. The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.

Ventura County, 601 F.2d at 1084. *See also: Federal Power Comm'n v. Oregon,* 349 U.S. 435 (1955).[16]

---

[16] The Ventura court further noted:

As Ventura recognized in filing its second amended complaint, the National Environmental Protection

Similarly, in the present instance, the County seeks to prohibit the federally authorized activity. Just as the test drilling in *Brubaker* was essential to establishing the mining claims in question therein, so too is the Cities' construction of its diversion facilities essential to the exercise of its federal easement rights and its decreed water rights.

Finally, the County simply misstates the facts in *Brubaker* when it alleges that "El Paso County attempted to categorically prohibit any drilling activity on federal land." Co. Br. at p. 27.

> The appellants then applied to the Board for a special use permit authorizing drilling of the proposed test holes in El Paso County. El Paso County considered the permit necessary because the appellant's mining claims in the County are located within an A-2 Agricultural zoning district, and "mineral and natural resources extraction" *is a permitted use only if such a permit is obtained.* (Emphasis added.)

Brubaker, 652 P.2d at 1053. In further explanation of its decision, the *Brubaker* court subsequently stated:

> In the present case, we are not presented with a challenge to the facial validity of the El Paso

---

> Act ("NEPA") and the guidelines, regulations and Executive Orders issued in pursuance of that Act, mandate extensive federal consideration and federal-local cooperation concerning the local, environmental impact of federal action under the Mineral Lands Leasing Act. If federal officials fail to comply with these requirements, Ventura has a remedy against those officials.

Id. at 1086.

> zoning ordinances or with the question of whether the appellants could be required to apply for a permit under those ordinances. Rather, we are faced with the issue reserved by the Court in *State ex rel Andrus v. Click, supra.* That is, *we consider a specific application of the local regulations* so as to prohibit activities authorized by federal legislation. (Emphasis added.)

Id. at 1059.[17] Thus, there was no "blanket" prohibition in *Brubaker,* but rather a fact specific prohibition evidenced by a permit denial.

(b) Granite Rock Supports a Finding of Pre-Emption.

The United States Supreme Court decision in *California Coastal Commission v. Granite Rock,* 480 U.S. 572 (1987) is consistent with the above observations, and defendants' reliance thereon is misplaced. Although the sharply divided court ruled that reasonable *state environmental regulations* covering Forest Service land were not per se pre-empted by federal law, the five-to-four majority described this holding as a "narrow" rejection of a "purely facial challenge." *Id.* at 580, 593. Granite Rock had not even applied for a state permit, arguing that there was no possible set of conditions that the state could place on its permit which would not conflict with federal law. It therefore had " . . . lost the possibility of

---

[17] The issue reserved in *Andrus v. Click,* 97 Id 791, 554 P.2d 969 (1976), as described by the *Brubaker* court, involved " . . . the question of whether the state could deny such a permit" for activities on federal land. *Id.* at 1059.

making this argument [prohibition] in this litigation." *Id.* at 588.[18] The Court stressed that the state was not asking Granite Rock to comply with a *local* land use plan or zoning ordinance, but rather with the regulations of a *state* commission concerned over "compliance with the environmental criteria in *the Coastal Act itself.*" (Emphasis added.) *Id.* at 585, n. 2.

Further, the *Granite Rock* Court accepted the state's assertion that it did not seek to prohibit the activity, but only to regulate the environmental aspects thereof. *Id.* at 587. However, since Granite Rock had not applied for the state permit, it was unable to show the conditions which the state would have placed upon its permit. Given the "as yet unidentifiable conflicts with the federal scheme" and the "barren record," the court cautiously accepted the possibility that the state might impose *reasonable environmental controls.* (Emphasis added.) *Id.* at 594.[19]

---

[18] Significantly, the majority decision assumed without deciding, an assumption deemed "correct" in the dissent by Justices White and Scalia and consistent with the decision in *Ventura County,* that "the combination of the NFMA and the FLPMA pre-empt the extension of state land use plans . . . in national forest lands." *Granite Rock,* 480 U.S. at 585, 612.

[19] Even environmental concerns, assuming they can be addressed by the local entity, cannot be of a general or generic character or they will run afoul of the pre-emption doctrine. As stated in *Ogden Environmental Services v. City of San Diego,* 687 F.Supp. 1436, 1448 (S.D. Ca. 1988):

> Allowing the local governments to impose a permit requirement and then to deny the permit on unspecified environmental grounds, without articulating specific health or safety concerns or setting forth particular environmental requirements which the facility must meet, surely frustrates congressional

Nevertheless, the Court cautioned that there could be "state environmental regulation so severe that a particular land use would become commercially impracticable."[20] *Id.* at 587.

The facts of the present case are distinguishable from those found in *Granite Rock,* and are on point with those in *Brubaker.* The County does seek to prohibit the activity in question. Unlike Granite Rock, the Cities applied for a local permit and are not making a facial challenge. There is now a record demonstrating the reasons for rejection by the local authority, i.e., a record establishing an irreconcilable conflict. Further, this court is now faced with a situation wherein a *local* entity is attempting to enforce what has been determined by the Tenth Circuit to be *local* regulations. *City and County of Denver v. Bergland,* 695 F.2d 465, 485 (10th Cir. 1982).[21] Thus, the *state* regulatory

---

intent behind the whole research, development, and demonstration program.

Just such an inadequate articulation is in evidence in this case. *See also Ogden Environmental Services v. City of San Diego,* 692 F.Supp. 1222 (S.D. Ca. 1988).

[20] To the extent the County and the Fund now argue that the federal mitigation plan was inadequate, despite its operational flow release option, there is, in the minds of these defendants, no reasonable environmental regulation available for this project configuration. That is to say, any regulation would be so severe as to amount to a prohibition, the very exception to allowable environmental regulation noted in *Granite Rock,* 480 U.S. at 587.

[21] In reaching its conclusion that H.B. 1041 requirements were "local" in nature, the Tenth Circuit cited with approval the Ninth Circuit decision in *Columbia Basin Land Protection Association v. Schlesinger,* 643 F.2d 585 (9th Cir. 1981), wherein the Court found that

scheme required by *Granite Rock* is absent. *Granite Rock*, 480 U.S. at 583. Finally, even if the regulations in question were being imposed by the state, they would not pass the "reasonableness" test enunciated in *Granite Rock*. The identification of any shift in wetland species composition as an unacceptable "significant deterioration" was clearly unreasonable, as were any findings of nuisance or adverse impacts on aquatic life. *See* pp. 39-40, *infra*.[22]

The situation in the present case is the very result feared by the dissenting opinion in *Granite Rock*, i.e., "duplicative" processes wherein a local regulator has given itself final authority to determine how federal lands are to be used. *Id.* at 605. Indeed, Justice Scalia ends his opinion with the following observation:

> If environmental control is, as California now assures us, its limited objective in this case, then *it must simply achieve that objective by means other than a land use control scheme.* If and when it does so, we may have occasion to decide (as we need not today) whether state environmental controls are also pre-empted. More likely, however, the question will not arise in the future, as it has not arisen in the past, because the *federal government's voluntary accommodation of state environmental concerns – an accommodation that could not occur here only because California neglected to participate in the proceedings.* (Emphasis added.)

"state" standards do *not* include "local" requirements. *See also Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1055 (9th Cir. 1985).

[22] It should also be noted that in *Granite Rock* the regulating authority had not participated in the federal permit process.

Id. at 614. Despite the fact that the above-referenced "accommodation" occurred in this instance through the federal permitting processes, the County persists in its attempt to impose its own controls through its local land use plan. That attempt cannot be sustained.[23]

* * *

E. THE CITIES HAVE STANDING TO ASSERT DUE PROCESS RIGHTS.

The Cities were required to apply to the County for permits in the same manner as any property owner because the Cities are expressly defined as "persons" within the meaning of the enabling legislation. C.R.S. §§24-65.1-102(6) and 24-65.1-501(1)(a) (1990). *Grand County,* 782 P.2d at 764. As such "persons," the Cities are entitled to the same legislative assurance that their

---

[23] The County also misstates the holding of the Court in *Friends of the Earth v. U.S. Navy,* 841 F.2d 927, 936 (9th Cir. 1988), when it argues that "the Court rejected the Navy's argument, finding that the state act's combination of land use and environmental regulations did not mandate any particular use of the land . . . and was therefore not pre-empted." Co. Br. at 29. Rather, the court *rejected* application of that portion of the regulation dealing with land use, finding that it indeed was pre-empted and merely allowed the application of "environmental regulations." *Id.* at 936.

property rights will be protected.[65] C.R.S. §24-65.1-106(1)(a) (1990) provides "[n]othing in this article shall be construed as . . . diminishing the rights of owners of property as provided by the state Constitution or the Constitution of the United States." The constitutional rights of owners include the rights to just compensation when land use regulations are used to accomplish a "taking" of property. *Keystone Bituminous Coal Association v. DeBenedictis* 94 L.Ed.2d 472, 107 S.Ct. 1232 (1987). Nevertheless, the County now comes full circle and argues that the Cities are not entitled to their Fifth or Fourteenth Amendment rights because they are not "persons."

The Defendants again rely upon a line of cases which are designed to keep the courts out of intermural disputes between political subdivisions of the same state. Most of the cases cited by Defendants in support of the "per se" rule involve some sort of taxation issue; all of the cases involve disputes over the state allocation of political power. However, the instant case does not involve an internal dispute. It concerns, instead, the regulatory taking of the property interests of these statutory "persons".

Defendants ignore blackletter law cited at pages 28 and 29 of the Cities' Opening Brief concerning a municipality's right to just compensation, claiming that said

---

[65] The gravamen of the Cities' Sixth and Twelfth Causes of Action is that the Cities, as owners of decreed water rights, have been deprived of those rights by a regulatory taking. The water rights in question were *not* allocated to the Cities by the State. Rather, these property rights were purchased by the Plaintiffs as home rule cities.

authority applies only to "formal condemnation cases." However, if municipalities are absolutely barred from asserting substantive due process or regulatory taking claims as the Defendants contend, there would be no reason for any state to institute such "formal condemnation" proceedings. The state could simply create regulations which accomplish the same goal. The Supreme Court has held that even

> Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution. Such a law . . . would constitute a taking of the State's property without just compensation, in violation of the Fifth Amendment.

Block v. North Dakota, 461 U.S. 273, 291, 856 (1983).

The absurdity of the "per se" rule has gradually lead to the more rational line of cases cited at pp. 21-23 of Plaintiffs' Brief. The Defendants have attempted to mischaracterize these decisions, but the referenced opinions continue to be offered as authority that "judicial support for this [per se] rule may be waning with time." *Amato v. Wilents*, 952 F.2d 742, 754-755 (3rd Cir. 1991).

Defendants fall back on *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), claiming that the facts of *Trenton* are "very similar" to the instant case. Co. Br. at 41, n. 15. However, *Trenton* involved disputed taxation issues rather than a regulatory taking. Moreover, *Trenton* is based upon a "creature of the state" rationale. As a result, it did not apply when another New Jersey municipality was allowed to use the Fourteenth Amendment to challenge the zoning of an adjoining New York municipality.

Town of River Vale v. Town of Orangetown, 403 F.2d 684 (2nd Cir. 1968).

The Colorado Supreme Court cited the *River Vale* case in *Board of County Comm'rs v. City of Thornton*, 629 P.2d 605, 611 (1981), where the Court held that Thornton, as a home rule city and as the owner of property adjacent to the zoned property, had standing to challenge an Adams County zoning plan. The Court specifically held that "we find no reason in policy to deny the landowner City the same right to challenge illegal zoning as we have accorded private landowners." *Id.* at 610, citing *River Vale* in recognition of "a due process dimension." *Id.* at 611.

Further, the Supreme Court has cautioned that the line of cases relied upon by Defendants are limited to their facts. *Gomillion v. Lightfoot*, 364 U.S. 339, 343 (1960). The Court warned that a "correct reading of the seemingly unconfined dicta" of these cases does not allow the state "plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations" and that "a state legislature may not be omnipotent even as to the disposition of some types of property owned by municipal corporations." *Id.* at 343 and 344.

Defendants also place a great deal of reliance upon a footnote to *Orchard City v. Delta County Comm'rs*, 751 P.2d 1003, 1006 (Colo. 1988), another taxation case. *Orchard City*, however, serves to illustrate the need to focus the standing question upon the circumstances of the case, rather than resorting to the rubric of a "per se" rule. First, *Orchard City* addressed the distribution of tax revenues

rather than a City's right to protect its purchased property rights. Second, *Orchard City* is not identified as a home rule municipality.[66] *Contra: Board of County Comm'rs v. City of Thornton, supra.* Finally, since it was not necessary for the court to address the equal protection argument, this footnote is clearly dicta.

The Cities are not asking the court to apply a mechanical standing argument, but rather seek the same standing as any property owner, consistent with their statutory designation as "persons." The County cannot deprive these statutory persons of their property rights by irrelevant criticism of the proprietary/governmental distinction. The County's reliance on the sweeping statements in *Trenton* clearly go beyond the scope of the taxation issues in that case. *See Gomillion, supra.*

The County also vainly argues that the Cities are not "persons" under 42 U.S.C. §1983, ignoring the more recent decision in *Santiago Collazo v. Franqui Acosta,* 721 F.Supp. 385 (D. Puerto Rico 1989) and relying upon *City of Safety Harbor v. Birchfield,* 529 F.2d 1251 (5th Cir. 1976). However, as the *Santiago* court explains, *Safety Harbor* relied upon *Monroe v. Pape,* 365 U.S. 167, (1961), which was overruled in *Monell v. Department of Social Services,*

---

[66] Defendants attempt to avoid standing for home rule cities by citing *Village of Arlington Heights v. Regional Transportation Auth.,* 653 F.2d 1149 (7th Cir. 1981). However, home rule municipalities established under the Colorado Constitution stand on a different footing. They have standing even in cases involving taxation issues. *Denver Urban Renewal Auth. v. Byrne,* 618 P.2d 1374 (Colo. 1980). The state Supreme Court recently reiterated this home rule distinction. *Mesa Verde Co. v. Montazuma County,* 831 P.2d 482, 485 (Colo. 1992).

436 U.S. 658, 690 (1978). *Monroe* had held that municipalities were not "persons" liable under §1983. However, once *Monroe* was overruled, it became a strained analysis to hold that a municipal corporation was a "person" within one clause of §1983 (1981 and 1993 Supp.), but not a "person" within another clause of the same statute. *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 503 (6th Cir. 1986).

It is just as strained an analysis for the trial court to hold that the Cities are defined as "persons" by the statute (and therefore are not entitled to the exemptions ordinarily provided to home rule municipalities), while simultaneously depriving the Cities of the rights which they would clearly enjoy as "persons", if they were treated as private property owners rather than municipalities. Since the enabling legislation describes the Cities as "persons" and requires the Cities to apply for a permit, the Cities must be afforded the same rights expressly granted to all property owners affected by this statute. C.R.S. §24-65.1-501(1)(a) (1990).

* * *

COLORADO COURT OF APPEALS
No. 93CA0386
No. 93CA0412

PETITION FOR REHEARING
OF PLAINTIFFS-APPELLANTS

City of Colorado Springs and City of Aurora, Colorado, municipal corporations,

Plaintiffs-Appellants and Cross-Appellees,

v.

The Board of County Commissioners of the County of Eagle, State of Colorado; George A. Gates, Johnette Phillips, James E. Johnson, Jr., in their official capacities as individual members of said Board; The Board of County Commissioners of the County of Eagle, in its capacity as the permitting authority under §24-65-101 *et seq.*, C.R.S.; The Eagle County Planning Commission; Mark Donaldson, Robert Tether, Arlene Quenon, Robert Morris, Donald Price, in their official capacities as individual members of said commission; The County of Eagle, State of Colorado; Holy Cross Wilderness Defense Fund; and Vail Valley Consolidated Water District,

Defendants-Appellees and Cross-Appellants.

Appeal from the District Court of Eagle County
Honorable William L. Jones, Judge
No. 88CV142

Division III — JUDGMENT AFFIRMED
Opinion by JUDGE DAVIDSON — IN PART, REVERSED
IN PART, AND CAUSE
Jones, and Rothenberg,
JJ., concur — REMANDED WITH DIRECTIONS

Anderson, Gianunzio, Dude, Pifher & Lebel, P.C., Mark T. Pifher, William Kelly Dude, Colorado Springs, Colorado, for Plaintiffs-Appellants and Cross-Appellees

James R. Fritz, County Attorney, Eagle, Colorado; Holme Roberts & Owen, L.L.C., Dennis J. Herman, Henry W. Ipsen, Mary H. Stuart, Denver, Colorado for Defendants-Appellees and Cross-Appellants The Board of County Commissioners of the County of Eagle, State of Colorado; George A. Gates, Johnette Phillips, James E. Johnson, Jr.; The Board of County Commissioners of the County of Eagle, State of Colorado; The Eagle County Planning Commission; Mark Donaldson, Robert Tether, Arlene Quenon, Robert Morris, Donald Price; The County of Eagle, State of Colorado

Sierra Club Legal Defense Fund, Lori J. Potter, Denver, Colorado; Land and Water Fund of the Rockies, Frances M. Green, Boulder, Colorado.

* * *

3. The Court's decision not to address the preemption cases (page 7) is inappropriate even under the Court's strained interpretation of state law. Even assuming that the permit could be denied to a home rule municipality under the terms of the state statute, the preemption case law as cited in the briefs indicates that though local entities may "regulate" environmental

impacts, this is not a basis upon which to veto or deny permits for federally approved projects located entirely on federal lands. See Pl. Opening Br. at P. 10, Answer Br. at pp. 14-20, 36; See e.g. *Brubaker v. Board of County Commissioners,* 652 P.2d 1050, 1059 (Colo. 1982) citing *Andrus v Click,* 97 Id. 791, 554 P.2d 969 (1976) (permit denial constitutes prohibition of federally authorized activity). Finally, the cities have asserted that the "nuisance" regulations are "land use" concerns and thus preempted.

* * *

17. With reference to the standing/due process claims (pp. 28-32), the Court overlooks the fact that constitutionally created home rule powers control over enactments of the General Assembly even in matters of statewide concern. See e.g. *Denver v. Grand County,* 782 P.2d at 762; *City of Thornton,* 194 Colo. at 535. Further, the Court erroneously concludes that home rule municipalities are "creatures of the state." The Supreme Court has stated that "as a home rule city with its own constitutional underpinning, Denver was not a political subdivision of the state. . . . " *Mesa Verde County v. Montezuma County,* 831 P.2d 482, 485 (Colo. 1992). See also Pl. Opening Br. at p. 25. The Court ignores black letter law that municipalities are entitled to just compensation in such circumstances. See Pl. Opening Br. at pp. 28-29 citing *Nichols on Eminent Domain* and ALR.3d; See also 91 L.Ed.2d 582; *Metagorda County v. Russell Law,* 19 F.3d 215, 223 (5th Cir. 1994) (though the takings clause is couched in terms of "private property," it is recognized that the clause also applies to "independently held and controlled property of a state *or of a local subdivision.*") The Cities

purchased these water rights in the free market, and they cannot subsequently be taken without compensation. See *Worcester v. Worcester Consol. Street R. Co.*, 196 U.S. 539, 551 (1905). Finally, the Cities did not argue that the dicta in *Town of Orchard City* was "eroded" by a case decided seven years before (page 31), only that the *City of Montrose* decision indicated state Supreme Court acceptance of municipal use of the Fourteenth Amendment outside of the "taxation" context.

* * *

SUPREME COURT, STATE OF COLORADO

CASE NO. 94 SC 765

COLORADO COURT OF APPEALS, CASE NOS. 93CA0386, 93CA0412 EAGLE COUNTY DISTRICT COURT, CASE NO. 88CV142

PETITION FOR WRIT OF CERTIORARI

City of Colorado Springs and City of Aurora, Colorado, municipal corporations,

Petitioners,

v.

The Board of County Commissioners of the County of Eagle, State of Colorado; George A. Gates, Johnette Phillips, James E. Johnson, Jr., in their official capacities as individual members of said Board; The Board of County Commissioners of the County of Eagle, in its capacity as the permitting authority under §24-65101 *et seq.*, C.R.S.; The Eagle County Planning Commission; Mark Donaldson, Robert Tether, Arlene Quenon, Robert Morris, Donald Price, in their official capacities as individual members of said commission; The County of Eagle, State of Colorado; Holy Cross Wilderness Defense Fund; and Vail Valley Consolidated Water District,

Respondents.

ANDERSON, GIANUNZIO, DUDE, PIFHER & LEBEL, P.C.

Mark T. Pifher
104 South Cascade Avenue
Suite 204
Colorado Springs, CO 80903
(719) 632-3545
Attorneys for Petitioners

ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in allowing a county, under the Colorado Land Use Act, § 24-65.1-101 *et seq.* 10B C.R.S. (1988 & Supp. 1994) (H.B. 1041), to veto a municipal water project located on federal lands?

* * *

3. Did the Court of Appeals err in ruling that Colorado home rule municipalities do not have standing to pursue a claim for the regulatory taking of property without just compensation?

* * *

Finally, even assuming that the actions of the county did not run afoul of Article XX, Section 1, the doctrine of federal preemption does not allow the county to veto a permit of a federally approved project located entirely on federal lands. See *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050, 1059 (Colo. 1982), citing *Andrus v. Click*, 97 Colo. 791, 554 P.2d 969 (1976); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987). The Court of Appeals refused to even reach this issue.

* * *

D. THE COURT OF APPEALS ERRED IN RULING THAT COLORADO MUNICIPALITIES DO NOT HAVE STANDING TO PURSUE A CLAIM FOR THE REGULATORY TAKING OF PROPERTY WITHOUT JUST COMPENSATION.

The Court of Appeals found that the cities had no standing under the Fifth and Fourteenth Amendments to

the United States Constitution even though they were operating in their proprietary capacity in the provision of a water supply which they had previously acquired in the open market. The court's decision constitutes a total bar to any regulatory takings claim, the remedy of last resort should the county have the authority to deny the permits necessary to construct the project.[9] In so ruling, the court erroneously relied on dicta in *Orchard City v. Delta County Comm'rs*, 751 P.2d 1003, 1006, n.3 (Colo. 1988). That case, and the precedent cited therein, dealt with the allocation of political authority, including taxation authority, and did not address the taking of property interests.

The very essence of a home rule city is embodied in the constitutional mandate that in its local and municipal affairs the city has full and complete authority. The legislature is powerless to change this essential rule. *Four-County Metropolitan Improvement Dist. v. Board of County Comm'rs*, 149 Colo. 284, 304, 369 P.2d 67 (1962); *City of Thornton*, 194 Colo. at 535 (even though a matter may be of statewide concern, the General Assembly has no power to enact any law that denies a specifically granted constitutional right). Colorado home rule municipalities are not to be treated as mere "political subdivisions" of the state. *Mesa Verde County v. Montezuma County*, 831 P.2d 482, 485 (Colo. 1992).

In situations involving the property interests of municipalities, claims for compensation can indeed be

---

[9] It should be reiterated that there were no water court decrees or federal approvals for "alternative" projects, while the county failed to identify what mitigation it might find acceptable under the application before it.

asserted. See I. Julius, et al., Nichols on Eminent Domain §2.225[1], at 2158 (3rd Ed. 1993); Annotation, Condemnation of Public Entities Land, 35 ALR.3d 1293, 1307 (1971); *Worcester v. Worcester Consol. Street R. Co.*, 196 U.S. 539, 551 (1905). The Court of Appeals ignored such precedent and the logic upon which it is based. See also: Case Comment, *Municipal Corporation Standing to Sue the State: Rogers v. Brockette*, 93 Harv. L. Rev. 586, 590-91 (1980); *United States v. Fifty Acres of Land*, 469 U.S. 24 (1984) (reference to "private property" in the takings clause of the Fifth Amendment encompasses the property of state and local governments). Hence, if the county possesses such veto authority, the cities must have recourse to protect their property rights through the assertion of a constitutional takings claim.

* * *

APPENDIX O

Colorado Land Use Act

§ 24-65.1-101. Legislative declaration

(1) In addition to the legislative declaration contained in section 24-65-102(1), the general assembly further finds and declares that:

(a) The protection of the utility, value, and future of all lands within the state, including the public domain as well as privately owned land, is a matter of public interest;

(b) Adequate information on land use and systematic methods of definition, classification, and utilization thereof are either lacking or not readily available to land use decision makers; and

(c) It is the intent of the general assembly that land use, land use planning, and quality of development are matters in which the state has responsibility for the health, welfare, and safety of the people of the state and for the protection of the environment of the state.

(2) It is the purpose of this article that:

(a) The general assembly shall describe areas which may be of state interest and activities which may be of state interest and establish criteria for the administration of such areas and activities;

(b) Local governments shall be encouraged to designate areas and activities of state interest and, after such designation, shall administer such areas and activities of state interest and promulgate guidelines for the administration thereof; and

(c) Appropriate state agencies shall assist local governments to identify, designate, and adopt guidelines for administration of matters of state interest.

(Laws 1974, H.B.1041, § 1.)

---

§ 24-65.1-102. General definitions

As used in this article, unless the context otherwise requires:

(1) "Development" means any construction or activity which changes the basic character or the use of the land on which the construction or activity occurs.

(2) "Local government" means a municipality or county.

(3) "Local permit authority" means the governing body of a local government with which an application for development in an area of state interest or for conduct of an activity of state interest must be filed, or the designee thereof.

(4) "Matter of state interest" means an area of state interest or an activity of state interest or both.

(5) "Municipality" means a home rule or statutory city, town, or city and county or a territorial charter city.

(6) "Person" means any individual, partnership, corporation, association, company, or other public or corporate body, including the federal government, and

includes any political subdivision, agency, instrumentality, or corporation of the state.

(Laws 1974, H.B.1041, § 1.)

---

§ 24-65.1-105. Effect of article – public utilities

(1) With regard to public utilities, nothing in this article shall be construed as enhancing or diminishing the power and authority of municipalities, counties, or the public utilities commission. Any order, rule, or directive issued by any governmental agency pursuant to this article shall not be inconsistent with or in contravention of any decision, order, or finding of the public utilities commission with respect to public convenience and necessity. The public utilities commission and public utilities shall take into consideration and, when feasible, foster compliance with adopted land use master plans of local governments, regions, and the state.

(2) Nothing in this article shall be construed as enhancing or diminishing the rights and procedures with respect to the power of a public utility to acquire property and rights-of-way by eminent domain to serve public need in the most economical and expedient manner.

(Laws 1974, H.B.1041, § 1.)

---

§ 24.65.1-106. Effect of article – rights of property owners – water rights

(1) Nothing in this article shall be construed as:

(a) Enhancing or diminishing the rights of owners of property as provided by the state constitution or the constitution of the United States;

(b) Modifying or amending existing laws or court decrees with respect to the determination and administration of water rights.

(Laws 1974, H.B.1041, § 1.)

---

§ 24-65.1-203. Activities of state interest as determined by local governments

(1) Subject to the procedures set forth in part 4 of this article, a local government may designate certain activities of state interest from among the following:

(a) Site selection and construction of major new domestic water and sewage treatment systems and major extension of existing domestic water and sewage treatment systems;

(b) Site selection and development of solid waste disposal sites except those sites specified in section 25-11-203(1), C.R.S., sites designated pursuant to part 3 of article 11 of title 25, C.R.S., and hazardous waste disposal sites, as defined in section 25-15-200.3, C.R.S.;

(c) Site selection of airports;

(d) Site selection of rapid or mass transit terminals, stations, and fixed guideways;

(e) Site selection of arterial highways and interchanges and collector highways;

(f) Site selection and construction of major facilities of a public utility;

(g) Site selection and development of new communities;

(h) Efficient utilization of municipal and industrial water projects; and

(i) Conduct of nuclear detonations.

(Laws 1974, H.B.1041, § 1; Laws 1979, S.B.335, § 9; Laws 1979, H.B.1509, § 2; Laws 1983, S.B.282, § 26.)

---

§ 24-65.1-204. Criteria for administration of activities of state interest

(1)(a) New domestic water and sewage treatment systems shall be constructed in areas which will result in the proper utilization of existing treatment plants and the orderly development of domestic water and sewage treatment systems of adjacent communities.

(b) Major extensions of domestic water and sewage treatment systems shall be permitted in those areas in which the anticipated growth and development that may occur as a result of such extension can be accommodated

within the financial and environmental capacity of the area to sustain such growth and development.

(2) Major solid waste disposal sites shall be developed in accordance with sound conservation practices and shall emphasize, where feasible, the recycling of waste materials. Consideration shall be given to longevity and subsequent use of waste disposal sites, soil and wind conditions, the potential problems of pollution inherent in the proposed site, and the impact on adjacent property owners, compared with alternate locations.

(3) Airports shall be located or expanded in a manner which will minimize disruption to the environment of existing communities, minimize the impact on existing community services, and complement the economic and transportation needs of the state and the area.

(4)(a) Rapid or mass transit terminals, stations, or guideways shall be located in conformance with the applicable municipal master plan adopted pursuant to section 31-23-206, C.R.S., or any applicable master plan adopted pursuant to section 30-28-108, C.R.S. If no such master plan has been adopted, such areas shall be developed in a manner designed to minimize congestion in the streets; to secure safety from fire, floodwaters, and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Activities shall be conducted with reasonable consideration, among other things, as to the character of the area and its peculiar suitability for particular uses and

with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the jurisdiction of the applicable local government.

(b) Proposed locations of rapid or mass transit terminals, stations, and fixed guideways which will not require the demolition of residences or businesses shall be given preferred consideration over competing alternatives.

(c) A proposed location of a rapid or mass transit terminal, station, or fixed guideway that imposes a burden or deprivation on a local government cannot be justified on the basis of local benefit alone, nor shall a permit for such a location be denied sloely [sic] because the location places a burden or deprivation on one local government.

(5) Arterial highways and interchanges and collector highways shall be located so that:

(a) Community traffic needs are met;

(b) Desirable community patterns are not disrupted; and

(c) Direct conflicts with adopted local government, regional, and state master plans are avoided.

(6) Where feasible, major facilities of public utilities shall be located so as to avoid direct conflict with adopted local government, regional, and state master plans.

(7) When applicable, or as may otherwise be provided by law, a new community design shall, at a minimum, provide for transportation, waste disposal, schools,

and other governmental services in a manner that will not overload facilities of existing communities of the region. Priority shall be given to the development of total communities which provide for commercial and industrial activity, as well as residences, and for internal transportation and circulation patterns.

(8) Municipal and industrial water projects shall emphasize the most efficient use of water, including, to the extent permissible under existing law, the recycling and reuse of water. Urban development, population densities, and site layout and design of storm water and sanitation systems shall be accomplished in a manner that will prevent the pollution of aquifer recharge areas.

(9) Nuclear detonations shall be conducted so as to present no material danger to public health and safety. Any danger to property shall not be disproportionate to the benefits to be derived from a detonation.

(Laws 1974, H.B.1041, § 1; Laws 1975, H.B.1089, § 5.)

---

§ 24-65.1-301. Functions of local government

(1) Pursuant to this article, it is the function of local government to:

(a) Designate matters of state interest after public hearing, taking into consideration:

(I) The intensity of current and foreseeable development pressures; and

(II) Applicable guidelines for designation issued by the applicable state agencies;

(b) Hold hearings on applications for permits for development in areas of state interest and for activities of state interest;

(c) Grant or deny applications for permits for development in areas of state interest and for activities of state interest;

(d) Receive recommendations from state agencies and other local governments relating to matters of state interest;

(e) Send recommendations to other local governments and the Colorado land use commission relating to matters of state interest; and

(f) Act, upon request of the Colorado land use commission, with regard to specific matters of state interest.

(Laws 1974, H.B.1041, § 1.)

---

§ 24-65.1-402. Guidelines – regulations

(1) The local government shall develop guidelines for administration of the designated matters of state interest. The content of such guidelines shall be such as to facilitate administration of matters of state interest consistent with sections 24-65.1-202 and 24-65.1-204.

(2) A local government may adopt regulations interpreting and applying its adopted guidelines in relation to

specific developments in areas of state interest and to specific activities of state interest.

(3) No provision in this article shall be construed as prohibiting a local government from adopting guidelines or regulations containing requirements which are more stringent than the requirements of the criteria listed in sections 24-65.1-202 and 24-65.1-204.

(Laws 1974, H.B.1041, § 1.)

---

§ 214-65.1-502. Judicial review

The denial of a permit by a local government agency shall be subject to judicial review in the district court for the judicial district in which the major development or activity is to occur.

(Laws 1974, H.B.1041, § 1.)

APPENDIX P

Eagle County Land Use Regulations

EAGLE COUNTY REGULATIONS

CHAPTER 6

AREAS AND ACTIVITIES OF STATE INTEREST

6.01 ADMINISTRATIVE REGULATIONS

INTRODUCTORY AND GENERAL PROVISIONS

6.01.01 Title and Citation

1) These various sections and subsections that are organized into a comprehensive set of regulations are entitled and may be cited as the "Guidelines and Regulations for Areas and Activities of State Interest of the County of Eagle, State of Colorado."

2) This Section 6.01 is entitled and may be cited as the "Administrative Regulations."

6.01.02 Purpose and Findings

1) The purpose of these Regulations is to facilitate identification, designation, and administration of matters of State interest consistent with the statutory requirements and criteria set forth in Section 24-65.1-101, *et seq.*, C.R.S., and Guidelines for Identification and Designation approved by the Colorado Land Use Commission.

2) The Board of County Commissioners, County of Eagle, State of Colorado, finds that:

a) The notice and public hearing requirements of Section 24-65.1-404, C.R.S., have been followed;

b) These regulations are necessary because of the intensity of current and foreseeable development pressures on and within the County of Eagle;

c) These regulations were adopted after taking into consideration applicable guidelines adopted and issued by the Colorado Land Use Commission;

d) These regulations apply to the entire unincorporated territory of the County of Eagle;

* * *

6.03 SITE SELECTION AND CONSTRUCTION OF MAJOR NEW DOMESTIC WATER AND SEWAGE TREATMENT SYSTEMS

GENERAL AND INTRODUCTORY PROVISIONS

6.03.01 Title and Citation

These various sections constituting Section 6.03 of the "Guidelines and Regulations of Areas and Activities of State Interest of the County of Eagle, State of

Colorado," may be cited as the "Regulations for Site Selection and Construction of Major New Domestic Water and Sewage Treatment Systems" of Eagle County.

6.03.02 Purpose and Intent

The purpose and intent of the regulations contained in this Section are as follows:

1) To insure that new domestic water and sewage treatment systems are constructed in areas which will result in the proper utilization of existing treatment plants and the orderly development of Domestic water and sewage treatment systems within this County;

2) To insure that site selection and construction of major new domestic water and sewage treatment systems are conducted in such a manner as to minimize environmental impacts associated with such development;

3) To insure that site selection and construction of major new domestic water and sewage treatment systems are planned and developed in a manner so as not to impose an undue economic burden on existing or proposed communities within this County;

4) To insure that urban development, population densities, and site layout and design of water, wastewater, storm water and sanitation systems

shall be accomplished in a manner that will prevent the pollution of aquifer recharge areas;

5) To insure that the off-site impacts of such projects are effectively mitigated.

* * *

6.04.04 Waiver of Submission Requirements

1) The Permit Authority may waive any part but not all of the submission requirements imposed by this Regulation upon petition of the applicant that full compliance with the submission requirements would be unreasonably burdensome for the applicant and that the proposed development will have an insubstantial impact on the surrounding area. In cases in which the development or activity must also comply with PUD and/or subdivision regulations, the permit hearing required by these regulations should be held at the same time as the preliminary plat hearing. Such a waiver of submission requirements may be granted, after due consideration by the Permit Authority, upon a written determination that the information to be submitted is sufficient for the Permit Authority to arrive at a permit decision in full compliance with the law and these Regulations and

that the proposed development will have an insubstantial impact on the surrounding area.

2) The petition shall be considered and the decision rendered by the Permit Authority at a public hearing held in substantial compliance with the provisions of Subsection 6.01.25 of the Administrative Regulations adopted by this jurisdiction.

3) In the event the waiver request is denied, the applicant shall provide the required additional information on or before five (5) days prior to the date set for hearing of the application itself. If the applicant fails to provide such information, the Permit Authority may in its discretion vacate the public hearing on the application itself and require complete reapplication, or may continue the hearing in accordance with Subsection 6.01.26(a).

6.03.15 Approval of Permit Application

Amended by Resolution No. 84-20 Dated: 5/9/84

1) A permit application for site selection and construction of a major new domestic water or sewage treatment system shall be approved, with reasonable conditions, if any, in the discretion of the Permit Authority, if the proposed development complies with the following criteria:

a) New domestic water and sewage treatment systems shall be constructed in areas which will

result in the proper utilization of existing treatment plants and the orderly development of domestic water and sewage treatment systems of communities within this County within the development area and source development area;

b) The proposed development does not conflict with an approved local master plan or other applicable regional, state or federal land use or water plan;

c) The proposed development does not adversely affect either surface or subsurface water rights of upstream or downstream users;

d) Adequate water supplies, as determined by the Colorado Department of Health, are available for efficient operational needs;

e) Existing domestic water treatment systems servicing the area must be at or near operational capacity;

f) Existing domestic sewage treatment facilities servicing the area must be at or greater than eighty per cent (80%) of operational capacity;

g) The scope and nature of the proposed development will not compete with existing water and

sewage services or create duplicative services;

h) Age of existing water and sewage systems, operational efficiency, state of repair or level of treatment is such that replacement is warranted;

i) Area and community development and population trends demonstrate clearly a need for such development;

j) Existing facilities cannot be upgraded or expanded to meet waste discharge permit conditions of the Colorado Water Quality Control Division.

k) Appropriate easements can be obtained for any associated collector or distribution system that will serve existing and proposed needs;

l) The benefits of the proposed development outweigh the losses of any natural resources or agricultural lands rendered unavailable as a result of the proposed development;

m) The proposed development will not decrease the quality of peripheral or downstream surface or subsurface water resources below that designated by the Colorado Water Quality Control Commission as established on May 22, 1979, and

effective July 10, 1979, or more stringent standards subsequently adopted;

n) The proposed development or its associated collector or distribution system or new service areas will not violate federal or state air quality standards;

o) The proposed development or its associated collector or distribution system will not significantly deteriorate aquatic habitats, marshlands and wetlands, groundwater recharge areas, steeply sloping or unstable terrain, forests and woodlands, critical wildlife habitat, big game migratory routes, calving grounds, migratory ponds, nesting areas and the habitats of rare and endangered species, public outdoor recreation areas, and unique areas of geologic, historic, or archaeological importance;

p) The proposed development or its associated collector or distribution system will not significantly degrade existing natural scenic characteristics, create blight, nor cause other nuisance factors such as excessive noise or obnoxious odors;

q) The proposed development or its associated collector or distribution system will not create an

undue financial burden on existing or future residents within the development area and the source development area. The cost of securing an adequate supply of water for existing and future needs of the residents of the County shall be considered in determining whether an "undue financial burden" will result;

r) The salinity and advanced wastewater treatment offset plans required by Subsections 6.03.13(7)(b)(6) and 6.03.13(8)(e) have been approved by the Permit Athority [sic] and required fees associated therewith, if any, have been paid.

s) The construction of structures, buildings and improvements associated with the proposed development will not significantly impact existing or proposed communities within the development area and source development area.

Amended by Resolution No. 84-20 Dated: 5/9/84

t) The development site of a major new domestic water or sewage treatment system is not subject to significant risk from earthquakes, floods, fires, snowslides, landslides, avalanches, rockslides or other disasters which could cause a system operational breakdown.

2) The permit shall be denied if the applicant fails to satisfy all the criteria outlined in 6.03.15(1).

ADMINISTRATION, ENFORCEMENT AND PENALTIES

6.03.16 Administration, Enforcement and Penalties

* * *

submitted is sufficient for the Permit Authority to arrive at a permit decision in full compliance with the law and these regulations and that the proposed development will have an insubstantial impact on the surrounding area.

2) The petition shall be considered and the decision rendered by the Permit Authority at a public hearing held in substantial compliance with the provisions of Subsection 6.01.25 of the Administrative Regulations adopted by this jurisdiction.

3) In the event the waiver request is denied, the applicant shall provide the required additional information on or before five (5) days prior to the date set for hearing of the application itself. If the applicant fails to provide such information, the Permit Authority may in its discretion vacate the public hearing on the application itself and require complete reapplication, or may continue the hearing in accordance with Subsection 6.01.26(1).

6.04.15 Approval of Permit Application

Amended by Resolution No. 84020 Dated: 5/9/84

1) A permit application for a major extension of existing domestic water or sewage treatment system shall be approved, with reasonable conditions, if any, in the discretion of the Permit Authority, if the proposed development complies with the following criteria:

   a) Major extensions of domestic water and sewage treatment systems shall be permitted in those areas in which the anticipated growth and development that may occur as a result of such extension can be accommodated within the financial and environmental capacity of the development area and source development area to sustain such growth and development;

   b) The proposed development does not conflict with an approved local master plan or other applicable regional, state or federal land use or water plan;

   c) The proposed development does not adversely affect either surface or sub-surface water rights of upstream or downstream users within the development area and source development area;

   d) Adequate water supplies as determined by the Colorado

Department of Health are available for efficient operational needs;

e) Existing domestic water treatment systems servicing the area must be at or near operational capacity;

f) Existing domestic sewage treatment facilities servicing the area must be at or greater than eighty per cent (80%) of operational capacity;

g) The scope and nature of the proposed development will not compete with existing water and sewage services or create duplicate services;

h) Age of existing water and sewage systems, operational efficiency, state of repair, or level of treatment is such that replacement is warranted;

i) Area and community development and population trends demonstrate clearly a need for such development;

j) Existing facilities cannot be upgraded or expanded to meet waste discharge permit conditions of the Colorado Water Quality Control Commission;

k) Appropriate easements can be obtained for any associated collector or distribution system that

will serve existing and proposed needs;

l) The benefits of the proposed development outweigh the losses of any natural resources or agricultural lands rendered unavailable as a result of the proposed development;

m) The proposed development will not decrease the quality of peripheral or downstream surface or subsurface water resources below that designated by the Colorado Water Quality Control Commission as established on May 22, 1979, and effective July 10, 1979, or more stringent standards

* * *

6.05.15 Approval of Permit Application.

Amended by Resolution NO. 84-20 Dated: 5/9/84

(1) A permit application for development of a municipal or industrial water project shall be approved, with reasonable conditions, if any, in the discretion of the Permit Authority, if the proposed development complies with the following criteria:

a) The need for the proposed water project can be substantiated;

b) Assurances of compatibility of the proposed water project with federal, state, regional and County planning policies regarding land use and water resources;

c) Municipal and industrial water projects shall emphasize the most efficient use of water, including, to the extent permissible under existing law, the recycling and reuse of water. Urban development, population densities, and site layout and design of stormwater and sanitation systems shall be accomplished in a manner that will prevent the pollution of aquifer recharge areas;

d) Provisions to insure that the proposed water project will not contaminate surface water resources;

e) The proposed water project is capable of providing water pursuant to standards of the Colorado Department of Health;

f) The proposed diversion of water from the source development area will not decrease the quality of peripheral or downstream surface and subsurface water resources in the source development area below that designated by the Colorado Water Quality Control Division on May 22, 1979, and effective July 10, 1979, or more stringent standards subsequently adopted;

g) The proposed development and the potential diversions of water from the source development area will not significantly deteriorate aquatic habitats, marshlands and wetlands, groundwater recharge areas, steeply sloping or unstable terrain, forests and woodlands, critical wildlife habitats, big game migratory routes, calving grounds, migratory ponds, nesting areas and the habitats of rare and endangered species, public outdoor recreational areas, and unique areas of geologic, historic or archaeological importance;

h) The salinity and advanced wastewater treatment offset plans required by Subsections 6.05.13(16) and (17) have been approved by the Permit Authority and required fees associated therewith, if any, have been paid;

i) The construction of structures, buildings, and improvements associated with the proposed development will not significantly impact existing or proposed communities within the development area and source development area.

* * *

APPENDIX Q

Federal Land Policy Management Act
43 U.S.C. §§ 1700-1784

43 U.S.C. § 1701. Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that – . . .

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) The public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

* * *

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands;

* * *

---

43 U.S.C. § 1712. Land use plans

* * *

(c) (9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C.A. § 460*l*-4 et seq.], and of or for Indian tribes by, among other things, considering the policies of approved state and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public

lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

* * *

---

43 U.S.C. § 1732. Management of use, occupancy, and development of public lands

(a) Multiple use and sustained yield requirements applicable; exception

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

(b) Easements, permits, etc., for utilization through habitation, cultivation, and development of small trade or manufacturing concerns; applicable statutory requirements

In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such

law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns: . . .

* * *

---

43 U.S.C. § 1761. Grant, issue, or renewal of rights-of-way; authorized purposes; procedures applicable

* * *

(a) The Secretary, with respect to the public lands . . . and, the Secretary of Agriculture, with respect to lands within the National Forest System (except in each case land designated as wilderness), are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for –

(1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water;

* * *

---

43 U.S.C. § 1765. Terms and conditions

Each right-of-way shall contain –

(a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public health and safety environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards. . . .

* * *

APPENDIX R

National Forest Management Act
16 U.S.C. §§ 1600-1614

16 U.S.C. § 1600. Congressional findings

The Congress finds that –

(1) the management of the Nation's renewable resources is highly complex and the uses, demand for, and supply of the various resources are subject to change over time;

(2) the public interest is served by the Forest Service, Department of Agriculture, in cooperation with other agencies, assessing the Nation's renewable resources, and developing and preparing a national renewable resource program, which is periodically reviewed and updated;

(3) to serve the national interest, the renewable resource program must be based on a comprehensive assessment of present and anticipated uses, demand for, and supply of renewable resources from the Nation's public and private forests and rangelands, through analysis of environmental and economic impacts, coordination of multiple use and sustained yield opportunities as provided in the Multiple-Use Sustained-Yield Act of 1960 (74 Stat. 215; 16 U.S.C. 528-531), and public participation in the development of the program;

* * *

16 U.S.C. § 1604. National Forest System land and resource management plans

* * *

(e) Required assurances

In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans –

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C.A. §§ 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

* * *

---

16 U.S.C. § 1612. Public participation

(a) Adequate notice and opportunity to comment

In exercising his authorities under this subchapter and other laws applicable to the Forest Service, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.

* * *

APPENDIX S

Organic Act of 1897
16 U.S.C. §§ 475-481

16 U.S.C. § 475. Purposes for which national forests may be established and administered

All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

---

16 U.S.C. § 481. Use of waters

All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such

national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.

APPENDIX T

Multiple Use and Sustained Yield Act
16 U.S.C. §§ 528-531

16 U.S.C. § 528. Development and administration of renewable surface resources for multiple use and sustained yield of products and services; congressional declaration of policy and purpose

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

---

16 U.S.C. § 530. Cooperation for purposes of development and administration with State and local governmental agencies and others

In the effectuation of sections 528 to 531 of this title and the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

APPENDIX U

Property Clause

U.S. Const. Article IV, § 3, cl. 2

* * *

Power of congress over territories. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

* * *

APPENDIX V

U.S. Const. AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. AMENDMENT XIV

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each

State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but

all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX W

Supremacy Clause

U.S. Const. Article VI, cl. 2

* * *

Supremacy of constitution, treaties and laws. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX X

Public Law 96-560, 94 Stat. 3265 (1980)

* * *

(5) certain lands in San Isabel and White River National Forests, Colorado, which comprise approximately one hundred and twenty-six thousand acres, as generally depicted on a map entitled "Holy Cross Wilderness – Proposed", dated November 1980, and which shall be known as the Holy Cross Wilderness: *Provided*, That no right, or claim of right, to the diversion and use of existing conditional water rights for the Homestake Water Development project by the cities of Aurora and Colorado Springs shall be prejudiced, expanded, diminished, altered, or affected by this Act. Nothing in this Act shall be construed to expand, abate, impair, impede, or interfere with the construction, maintenance or repair of said project, nor the operation thereof, or any exchange or modification of the same agreed to by the cities and the United States, acting through any appropriate agency thereof;

* * *

APPENDIX Y

Code of Federal Regulation
36 C.F.R. Pt. 200-299

36 C.F.R. § 219.6 Public participation.

(a) Because the land and resource management planning process determines how the lands of the National Forest System are to be managed, the public is encouraged to participate throughout the planning process. the intent of public participation is to –

(1) Broaden the information based upon which land and resource management planning decisions are made;

(2) Ensure that the Forest Service understands the needs, concerns, and values of the public;

(3) Inform the public of Forest Service land and resource planning activities; and

(4) Provide the public with an understanding of Forest Service programs and proposed actions.

* * *

(c) Public participation activities, as deemed appropriate by the responsible line officer, shall be used early and often throughout the development of plans . . .

* * *

---

36 C.F.R. § 219.7 Coordination with other public planning efforts.

(a) The responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies. State and local governments, and Indian tribes.

* * *

(c) The responsible line officer shall review the planning and land use policies of other Federal agencies. State and local governments, and Indian tribes . . .

The review shall include –

(1) Consideration of the objectives of other Federal, State and local governments, and Indians tribes, as expressed in their plans and policies:

(2) An assessment of the interrelated impacts of these plans and policies:

(3) A determination of how each Forest Service plan should deal with the impacts identified; and,

(4) Where conflicts with Forest Service planning are identified, consideration of alternatives for their resolution.

(d) In developing land and resource management plans, the responsible line officer shall meet with the designated State official (or designee) and representatives of other Federal agencies, local governments, and Indian tribal governments at the beginning of the planning process to develop procedures for coordination. As a minimum, such conferences shall also be held after public

issues and management concerns have been identified and prior to recommending the preferred alternative. Such conferences may be held in conjunction with other public participation activities, if the opportunity for government officials to participate in the planning process is not thereby reduced.

(e) In developing the forest plan, the responsible line officer shall seek input from other Federal, State and local governments, and universities to help resolve management concerns in the planning process and to identify areas where additional research is needed. This input should be included in the discussion of the research needs of the designated forest planning area.

(f) A program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest being planned and the effects upon National Forest management of activities on nearby lands managed by other Federal or other government agencies or under the jurisdiction of local governments.

---

36 C.F.R. § 219.8 Regional planning procedure.

(b) *Responsibilities* – (1) *Chief, Forest Service.* The Chief shall establish agency-wide policy for regional planning and approve all regional guides.

(2) *Regional Forester.* The Regional Forester has overall responsibility for preparing and implementing the regional guide and for preparing the environmental impact statement for proposed standards and guidelines in the regional guide. The Regional Forester appoints and supervises the interdisciplinary team.

* * *

(d) *Guide approval.* The Chief shall review the proposed guide and the final environmental impact statement and either approve or disapprove the guide.

---

36 C.F.R. § 219.10 Forest planning – general procedure.

(a) *Responsibilities* – (1) *Regional Forester.* The Regional Forester shall establish regional policy for forest planning and approve all forest plans in the region.

(2) *Forest Supervisor.* The Forest Supervisor has overall responsibility for the preparation and implementation of the forest plan and preparation of the environmental impact statement for the forest plan. The Forest Supervisor appoints and supervises the interdisciplinary team.

* * *

(c) *Plan approval.* The Regional Forester shall review the proposed plan and the final environmental impact statement and either approve or disapprove the plan.

* * *

(d) *Public appeal of approval decision.* The provisions of 36 CFR Part 211, Subpart B apply to any administrative appeal of the Regional Forester's decision to approve a forest plan. Decisions to disapprove a plan and other decisions made during the forest planning process prior to the issuance of a record of decision approving the plan are not subject to administrative appeal.

* * *

BEST AVAILABLE COPY

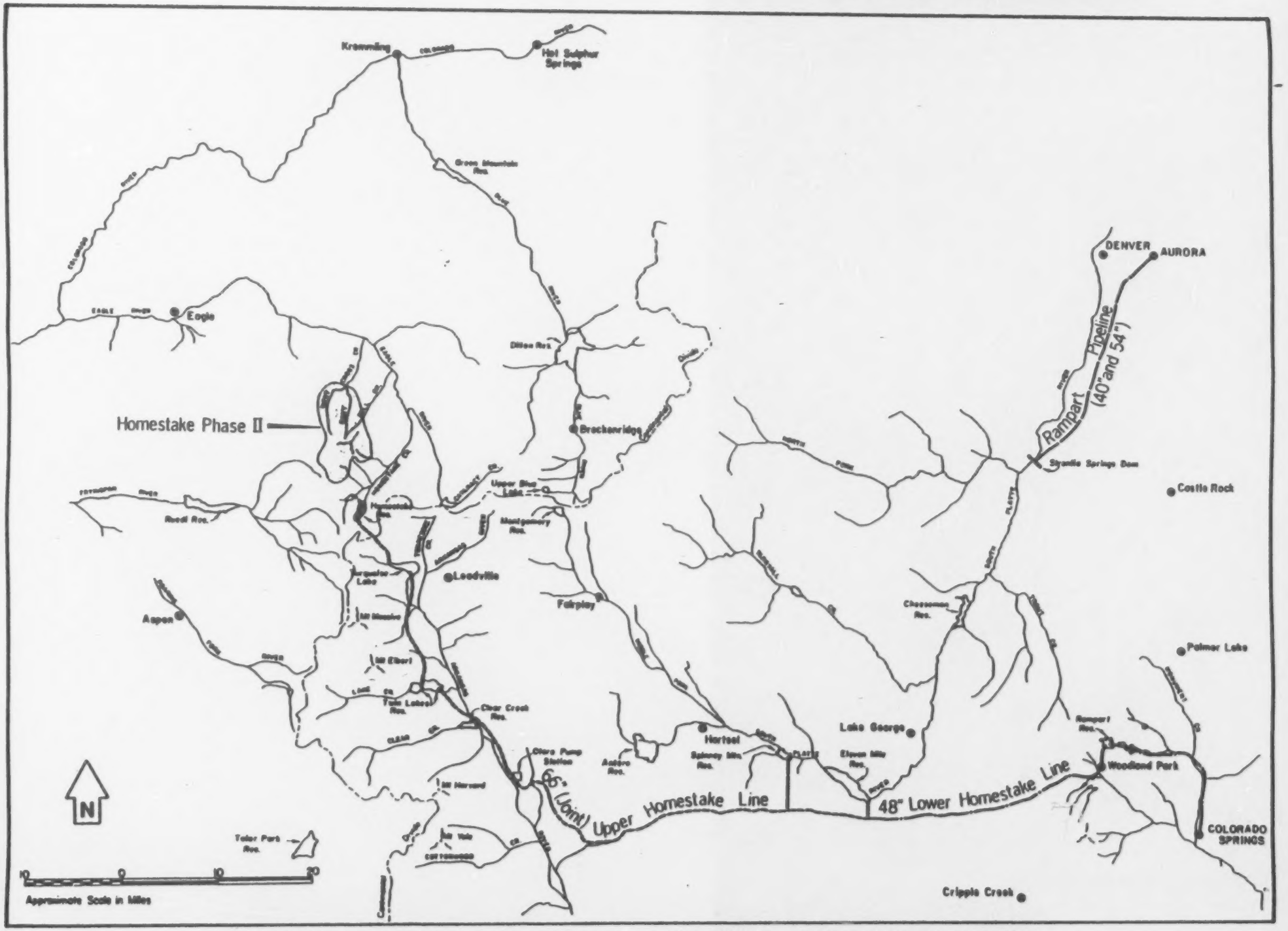

FIGURE 1-3 AURORA AND COLORADO SPRINGS WATER DELIVERY SYSTEMS

Supreme Court, U.S.
FILED
NOV 3 1995
CLERK

(3)

No. 95-428

In The

Supreme Court of the United States

October Term, 1995

CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Colorado Court Of Appeals

BRIEF IN OPPOSITION OF RESPONDENT HOLY CROSS WILDERNESS DEFENSE FUND

LORI POTTER*
SIERRA CLUB LEGAL DEFENSE FUND
1631 Glenarm Place, #300
Denver, CO 80202
(303) 623-9466

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

19 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

I. PETITIONERS' CASE DOES NOT PROPERLY PRESENT THE ISSUE OF A MUNICIPALITY'S STANDING TO ASSERT A TAKING 2

A. The Colorado Courts Have Held, on Adequate and Independent State Law Grounds, that Petitioners Have Not Yet Suffered Any Undue Interference With Their Water Rights. This Court Should Decline to Exercise its *Certiorari* Jurisdiction to Offer What Amounts to an Advisory Opinion on Standing 2

B. The Circuits Are in Agreement With Each Other and With This Court on the Proposition that Municipalities Cannot Assert a Taking Against the State 5

II. PETITIONERS HAVE FAILED TO PROPERLY RAISE A FEDERAL QUESTION OR SUBSTANTIAL FEDERAL ISSUES WITH RESPECT TO THEIR PREEMPTION CLAIM 8

A. Petitioners Provide No Basis for This Court's Review Under 28 U.S.C. § 1257, Because They Failed to Raise the Question of Federal Preemption in the Colorado Court of Appeals. Thus, the Question Cannot be Presented to This Court 8

TABLE OF CONTENTS – Continued

Page

B. Both Courts Below Have Found that No Prohibition of the Petitioners' Water Project Has in Fact Occurred. The Question of Federal Preemption is Not Properly Before this Court Until Such Time as an Actual Prohibition Has Occurred 10

C. There is No Extraordinary Reason for this Court to Address the Unpublished Decision of a State District Court Concerning Preemption. There is No Conflict Between the Circuits or With Prior Decisions of this Court 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Board of Levee Commissioners of the Orleans Levee Board v. Huls, 852 F.2d 140 (5th Cir. 1988).....6, 7

California Coastal Commission v. Granite Rock Mining Co., 480 U.S. 572 (1987).....10, 12

Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970) 2

City of Charleston v. Public Service Commission of W. Va., 57 F.3d 385 (4th Cir. 1995) 7

City of Chester v. Commonwealth Department of Trans., 434 A.2d 695 (Pa. 1981)..... 8

City of New York v. Richardson, 473 F.2d 923 (2d Cir. 1973), *cert. denied*, 412 U.S. 950 (1973)..... 7

City of Newark v. State of New Jersey, 262 U.S. 192 (1923) 6

City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231 (9th Cir. 1980), *cert. denied*, 449 U.S. 1039 (1980) 7

City of Trenton v. State of New Jersey, 262 U.S. 182 (1923) 6

Coleman v. Miller, 307 U.S. 433 (1939) 5

Friends of the Earth v. U.S. Navy, 841 F.2d 927 (9th Cir. 1988) 12

Housing Auth. of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City, 952 F.2d 1183 (10th Cir. 1991), *cert. denied*, 504 U.S. 912 (1991) 6

Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) 6

TABLE OF AUTHORITIES – Continued

Page

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) 4, 5

New Castle County School District v. State, 424 A.2d 15 (Del. 1980) 7

New Orleans v. New Orleans Water Works, 142 U.S. 79 (1891) 6

Rogers v. Brockette, 588 F.2d 1057 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979) 7

South Macomb Disposal Authority v. Township of Washington, 790 F.2d 500 (6th Cir. 1986) 6

United States v. Alabama, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) 6

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 4

Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980) 12

Village of Arlington Heights v. Regional Transportation Authority, 653 F.2d 1149 (7th Cir. 1981) 6

Williams v. Mayor of Baltimore, 289 U.S. 36 (1933) 5

STATUTES

Clean Water Act, 33 U.S.C. §§ 1251-1387 (1995) 12

Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1995) 12

28 U.S.C. § 1257 ..... 1, 8, 9

OTHER AUTHORITIES

L. Tribe, *American Constitutional Law* § 6-25 (2d ed. 1988) 12

COUNTERSTATEMENT OF THE CASE

Holy Cross Wilderness Defense Fund adopts the counterstatement of its co-respondent, Eagle County.

REASONS FOR DENYING THE WRIT

Nothing impels this Court's review of the settled proposition that a political subdivision has no standing to sue the state which created it. The result below is consistent with the decisions of this Court and the Circuits. Further, this Court should follow its customary course of refraining from deciding standing issues when the petitioner cannot make a case that it is entitled to any relief on the merits, as is true here.

Nor should this Court grant *certiorari* to address the unpublished opinion of a state trial court on the issue of preemption. (The Colorado Court of Appeals did not deal with the issue.) Moreover, the petitioners did not appeal the trial court's ruling against them on this point and therefore cannot, consistent with 28 U.S.C. § 1257, present it to this Court.

I. PETITIONERS' CASE DOES NOT PROPERLY PRESENT THE ISSUE OF A MUNICIPALITY'S STANDING TO ASSERT A TAKING

A. The Colorado Courts Have Held, on Adequate and Independent State Law Grounds, that Petitioners Have Not Yet Suffered Any Undue Interference With Their Water Rights. This Court Should Decline to Exercise its *Certiorari* Jurisdiction to Offer What Amounts to an Advisory Opinion on Standing.

This Court should follow its customary course of refraining from deciding standing issues when the petitioner cannot make a case that it is entitled to any relief on the merits. *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 89 (1970) (declining to decide whether jurisdiction existed when it was plain that petitioner had not established the elements of his case). In addition to holding that the Cities had no standing to bring their takings claim, both courts below found that no prohibition of the Cities' water project has in fact occurred. The Cities do not contest here the lower courts' ruling that there has been no undue interference with their water rights.

The district court found that while the County had decided to deny the Cities a permit for one particular design of their proposed water project, it most certainly had not decided against granting any permit whatsoever:

> The Court has previously found that the Cities stipulated that they did not wish the Board to consider alternatives to the submitted Application. Therefore, the Board did not determine that a permit for the Project would be denied

> under any circumstances. Consequently, the question of whether the Board has authority to deny the Permits categorically is not before the Court.

App. 186a. Thus, on the basis of the record before it, the district court could not find that a taking had occurred. To the contrary, the County left open the possibility that a permit would be granted under different circumstances.

Similarly, the Colorado Court of Appeals held that no prohibition of the Cities' water project or interference with their property rights had taken place.

> The cities claim that . . . the Board attempted to 'veto' the project by denying the permits. We reject the cities' contention . . .

App. 24a. Far from prohibiting the project and "taking" the cities' water rights, the County acceded to the cities' insistence that the scope of their permit application be strictly limited and rejected the Cities' take-it-or-leave-it application:

> At the insistence of the cities, the Board limited its consideration to the water project as proposed, and did not consider whether any alternative configurations could be designed which would meet the regulatory criteria. Although the permits for the project were denied, the cities are not prohibited from resubmitting the proposed project with changes or from submitting a different proposal. The cities have not demonstrated that such alternatives are unfeasible. . . . *We do not perceive any undue interference with the exercise of the cities' established water rights.*

App. 21a (emphasis added).

The law of standing, like the rules of basketball, proceeds on the common sense assumption of "no harm, no foul." *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (at an "irreducible minimum," article III requires a plaintiff to show injury in fact in order to invoke the jurisdiction of the court). In this case, both lower courts have found that no harm has occurred. Petitioners have not appealed the lower courts' rulings that there has been no interference with the cities' water rights. Where it is conceded that there has been no injury in fact, there can be no standing to allege what is only a phantom injury.

The Cities might argue that their harm consists of not being permitted to build their water project exactly as they choose. But the Colorado Court of Appeals disposed of this argument, too, squarely holding on an adequate and independent state law ground that the Cities' water right "should not be understood to carry with it absolute rights to build and operate any particular water diversion project." App. 21a (citation omitted) (rejecting Cities' state law claim that the County's regulatory action in this case prevents them from exercising their water rights). The court upheld the County's right to regulate the manner in which the Cities exercise their water rights, which may still be developed under alternative scenarios. App. 20a-21a.

The lower court's decision on this point accords with the treatment that this Court has extended to the same proposition of law. In *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352 (1986), this Court was unable to conclude that a taking had occurred where "the

holdings of both courts below leave open the possibility that some development will be permitted." Here, as in *County of Yolo*, the lower courts' findings that other development plans may be accepted transforms the case into one in which no takings issue is present. 477 U.S. at 353, n.9.

This is a case in which the lower courts agree that no harm has been done, petitioners themselves have dropped that claim, and other avenues remain open to petitioners to obtain the necessary permit. This Court should not make the extraordinary step of accepting *certiorari* jurisdiction over a case in this posture.

B. The Circuits Are in Agreement With Each Other and With This Court on the Proposition that Municipalities Cannot Assert a Taking Against the State.

Petitioners labor to create the appearance of a conflict on this issue, but no conflict actually exists. A long and consistent line of the decisions of this Court holds that a state entity such as a municipal corporation cannot assert a Fifth Amendment takings claim against its creator, the state. *Coleman v. Miller*, 307 U.S. 433, 441 (1939) ("Being but creatures of the State, municipal corporations have no standing to invoke the Contract Clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator"); *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the

will of its creator"); *City of Trenton v. State of New Jersey*, 262 U.S. 182, 188 (1923) (In no case "was any power, right, or property of a city or other political subdivision held to be protected by the Contract Clause or the Fourteenth Amendment. This Court has never held that these subdivisions may invoke such restraints upon the power of the State"); *City of Newark v. State of New Jersey*, 262 U.S. 192, 196 (1923) ("The city cannot invoke the protection of the Fourteenth Amendment against the State"); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-179 (1907) ("[T]he state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States"); *New Orleans v. New Orleans Water Works*, 142 U.S. 79, 89 (1891) ("[T]he city, being a municipal corporation and the creature of the state legislature, does not stand in a position to claim the benefit of the constitutional provision in question, since its charter can be amended, changed or even abolished at the will of the legislature").

Universally, the courts of appeals which have reached the merits of this issue have followed this line of authority and reiterated its rationale: a political subdivision cannot lodge constitutional complaints against its creating state. *Housing Auth. of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183, 1188 (10th Cir. 1991), *cert. denied*, 504 U.S. 912 (1991); *Board of Levee Commissioners of the Orleans Levee Board v. Huls*, 852 F.2d 140, 143 (5th Cir. 1988); *United States v. Alabama*, 791 F.2d 1450, 1456 (11th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986); *Village of Arlington Heights v. Regional Transportation Authority*, 653

F.2d 1149 (7th Cir. 1981); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980), *cert. denied*, 449 U.S. 1039 (1980); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973), *cert. denied*, 412 U.S. 950 (1973).

The Cities rely heavily on two cases from the Fourth and Fifth Circuits (*City of Charleston v. Public Service Comm'n of W.Va.*, 57 F.3d 385 (4th Cir. 1995) and *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979)) as supposed evidence of a conflict. Neither case contains a ruling on the merits of whether a political subdivision may sue its state for a taking. In *Charleston*, the Fourth Circuit ducked the question of whether the city had standing to assert a claim under the contracts clause, ultimately concluding that "we need not resolve this troublesome question because even if the cities have standing to maintain this action, their claim clearly fails on the merits." 57 F.3d at 390. *Rogers* addressed the quite distinct issue of a political subdivision's standing to challenge a state statute under the federal supremacy clause. When the Fifth Circuit discarded *Rogers* with its decision in *Board of Levee Comm'rs, supra*, it pointed out that *Rogers* contained mere *dicta* on the takings issue, because *Rogers* "dealt only with the *theoretical possibility* that a city has standing to sue its state." 852 F.2d at 143 (emphasis added). Therefore, neither *Charleston* nor *Rogers* helps the Cities create a conflict.

Nor do the cases from the Delaware and Pennsylvania Supreme Courts create a "conflict" requiring resolution; the Cities misuse them. *New Castle County School Dist. v. State*, 424 A.2d 15 (Del. 1980) was simply not a

standing case. Ruling on certified questions of law, the Delaware Supreme Court found not unconstitutional a state statute which directed a school district to convey real property for only nominal value. Neither the word "standing" nor the municipal standing doctrine appears anywhere in the opinion; again, the court merely assumed the existence of standing. Finally, the Pennsylvania Supreme Court case cited by the Cities held only that "the *Pennsylvania Constitution* does not allow the Commonwealth to escape its financial obligation owed to a public condemnee for property taken," and is therefore inapplicable to the Fifth Amendment claim asserted here. *City of Chester v. Commonwealth Dept. of Trans.*, 434 A.2d 695 (Pa. 1981) (emphasis added).

II. PETITIONERS HAVE FAILED TO PROPERLY RAISE A FEDERAL QUESTION OR SUBSTANTIAL FEDERAL ISSUES WITH RESPECT TO THEIR PREEMPTION CLAIM

A. Petitioners Provide No Basis for This Court's Review Under 28 U.S.C. § 1257, Because They Failed to Raise the Question of Federal Preemption in the Colorado Court of Appeals. Thus, the Question Cannot be Presented to This Court.

Eagle County denied the Cities a land use permit on numerous grounds, finding that the Cities' application contained multiple violations of County regulations. App. 3a. Ruling upon the Cities' subsequent claim that federal law preempted the County's permit decision, the district court upheld the grounds pertaining to wetlands and nuisance factors and found the remainder preempted. *Id.*

What happened next is dispositive of the Cities' assertion of jurisdiction here: Although Holy Cross Wilderness Defense Fund and the County appealed the district court's affirmative finding of partial preemption, App. 241a, the Cities failed to cross-appeal the district court's ruling that the wetlands and nuisance grounds for denial were not preempted. App. 243a. Notably, all the Cities can do now is to point to the *County's* notice of appeal raising the partial finding of preemption, App. 241a – that is, the issue that was decided in the Cities' favor. As we showed above, the Wilderness Defense Fund and the County appealed the issue which was the converse of the Cities' complaint; the Cities simply waived their issue. Accordingly, the Cities fail to meet their mandatory jurisdictional burden of showing that they "pressed the issue" that certain grounds for denial were *not* preempted.

Because violation of County regulations on any single ground supplied an adequate basis for the County's denial of the permit, App. 6a, the decision below rests upon a Colorado district court holding which was never appealed and cannot, consistent with 28 U.S.C. § 1257, now be considered by this Court. Holy Cross Wilderness Defense Fund incorporates by reference the further discussion of this point in Eagle County's Brief in Opposition.

The Cities did appeal to the Colorado Court of Appeals on the state law issue of the County's authority under Colorado statute to enact and apply the regulations under which it acted upon the Cities' permit application. App. 8a-9a. The Court of Appeals resolved that claim on adequate and independent state grounds not relevant here. The Cities cannot create *certiorari* jurisdiction by

bootstrapping their federal preemption issue to this different, state law claim. The Cities simply have lost the opportunity to present this issue to this Court by their failure to press and present it below.

B. Both Courts Below Have Found that No Prohibition of the Petitioners' Water Project Has in Fact Occurred. The Question of Federal Preemption is Not Properly Before this Court Until Such Time as an Actual Prohibition Has Occurred.

Even if the Cities had properly preserved this issue for review, it still is not ripe for resolution by this Court. A preemption claim arises when a party contends that it is subject to conflicting state and federal actions. *See California Coastal Comm'n v. Granite Rock Mining Co.*, 480 U.S. 572, 594 (1987) ("traditional preemption analysis . . . requires an actual conflict between state and federal law, or a congressional expression of intent to preempt"). Here, the Cities assert that the County has taken its water rights because the County has denied a permit for one of the various alternative designs of their water project. The courts below have expressly found that the County's decision does not amount to a prohibition of a water project authorized by federal action, however, as we discussed in section I.A of this brief. Rather, as the Colorado Court of Appeals pointed out to the Cities, they may repair their application and resubmit it to the County or apply for a permit for an alternative project configuration. The Court of Appeals found no interference with the Cities' water rights, App. 21a, a substantive holding that the Colorado Supreme Court left undisturbed. App. 215a.

Until such time as a lower court finds in the first instance that the County has actually prohibited the exercise of a right, and that the prohibition conflicts with an action of the federal government, there is no genuine claim of preemption. Because the County has left the door open to granting the Cities a permit, the Cities' preemption claim is not properly presented and does not merit review by this Court.

C. There is No Extraordinary Reason for this Court to Address the Unpublished Decision of a State District Court Concerning Preemption. There is No Conflict Between the Circuits or With Prior Decisions of this Court.

Even if there were a prohibition of the Cities' water project, and even if the Cities had properly preserved the preemption issue for review in this Court, this case still would not merit review on *certiorari*. The only ruling on the preemption issue in this case came in the district court; the word "preempted" appears in the decision of the Colorado Court of Appeals only to refer to the factual findings of the lower court (*see* section II.A, above). The Court of Appeals' decision simply does not stand for any proposition in the law of preemption which this Court could meaningfully address; not a single preemption case is cited in the opinion. This Court's *certiorari* jurisdiction does not exist to clarify the unpublished pronouncements of the state trial courts.

Further, preemption is a question of Congressional intent and therefore is largely a matter of construction of the particular statute involved in a given case. *See* L.

Tribe, *American Constitutional Law* § 6-25 (2d. ed. 1988). The Cities build their allegations of a conflict on two cases in which the plaintiffs' federal interests accrued under different statutes than the two involved here. (In this case, the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1995) and the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1995) establish the scope of, and limitations on, the Cities' interests).

The Cities ignore the statute-specific nature of pre-emption analysis when they cite *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980), which relied on the structure and purpose of the Mineral Leasing Act to find that that law held no role for state or local government decisionmaking. The Cities would have done well to look at a later Ninth Circuit decision, *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988), which holds that the Clean Water Act expressly reserves state and local regulatory jurisdiction. 841 F.2d at 934-5.

Finally, the Cities inexplicably use *California Coastal Comm'n v. Granite Rock Mining Co., supra*, a case under the Mining Law of 1872, as part of their "conflicts" argument. Because *Granite Rock* affirmed a state's right to impose environmental regulations in the mining context, however, *id.* at 594, the best use the Cities can make of it is to allege that the decision below runs afoul of a dissenting opinion. *See* Cities' Petition at 17. This does not come close to creating a conflict, however, or to providing a reason for this Court to grant *certiorari*.

As the County explains in its Brief in Opposition, both of the statutes which apply in this case contain anti-

preemption clauses which contemplate coincident compliance with state and local regulations. The result below is consistent with those statutes and with the caselaw interpreting them. And, as we have shown, the decision of the Colorado Court of Appeals is not inconsistent with either of the two cases to which the Cities try to contrast it. Accordingly, the conflict the Cities complain about is purely illusory.

CONCLUSION

For the reasons stated above, this Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

LORI POTTER*
SIERRA CLUB LEGAL DEFENSE FUND
1631 Glenarm Place, #300
Denver, CO 80202
(303) 623-9466

*Counsel of Record

No. 95-428

Supreme Court, U.S.
FILED
NOV 3 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CITY OF COLORADO SPRINGS and CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS,
Petitioners,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

BRIEF IN OPPOSITION OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO

JAMES R. FRITZE
Eagle County Attorney
P.O. Box 850
Eagle, CO 81631
(303) 328-8600

BARBARA J. B. GREEN
1800 Glenarm Place
Suite 1400
Denver, CO 80202
(303) 296-6400

HENRY W. IPSEN *
MARY HURLEY STUART
WALTER H. SARGENT
HOLME ROBERTS & OWEN LLC
1700 Lincoln, Suite 4100
Denver, CO 80203
(303) 861-7000

Counsel for the respondent Board of County Commissioners of the County of Eagle, State of Colorado

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a Colorado municipality has standing to assert a takings claim against another Colorado state entity in a Colorado state court.

2. Whether federal law implicitly pre-empts all state and local environmental regulation of a municipal water project located on federal land.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT OF THE CASE	1
A. Regulation of Municipal Water Projects Under Colorado Law	2
B. The Cities' Federal Permit Applications	3
C. The Cities' State Permit Application	4
D. Judicial Review of Eagle County's Action	5
REASONS FOR DENYING THE WRIT	7
I. THE CITIES' STANDING TO ASSERT A TAKINGS CLAIM IN A COLORADO STATE COURT AGAINST ANOTHER STATE ENTITY IS NOT AN APPROPRIATE ISSUE FOR THIS COURT'S REVIEW	8
A. The courts have consistently rejected the contention that a state subdivision, such as a municipality, has a federal constitutional right against uncompensated takings by another of that state's subdivisions	8
B. The federal law of standing does not determine whether a Colorado municipality may assert a takings claim against another Colorado state subdivision in a Colorado state court	10
C. The Cities' status as "home-rule" cities under the Colorado constitution does not undermine the reasoning of the Colorado Court of Appeals and, in any event, raises no federal issues for this Court's review	11

TABLE OF CONTENTS—Continued

Page

D. The Cities' distinction between a municipality's "proprietary" and "governmental" capacities raises only state-law issues that are inappropriate for this Court's review..... 12

E. Even if the Cities arguably had standing to assert takings claims, Eagle County's denial of a permit here clearly did not amount to a taking 13

II. THE CITIES' CLAIM THAT FEDERAL LAW PRE-EMPTS EAGLE COUNTY'S REGULATIONS, WHICH WAS "NOT PRESSED OR PASSED UPON BELOW," RAISES NO ISSUES FOR THIS COURT'S REVIEW 14

A. Because the Cities' claim of pre-emption was not pressed or passed upon in the Colorado appellate courts below, there is no basis for this Court's review of the claim under 28 U.S.C. § 1257 14

B. The District Court ruling against pre-emption does not conflict with a decision of a state court of last resort or a federal court of appeals 17

C. The District Court ruling against pre-emption is consistent with applicable decisions of this Court 18

D. The District Court correctly rejected the Cities' blanket claim that Eagle County's environmental regulations were pre-empted..... 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases	Page
Board of Levee Comm'rs v. Huls, 852 F.2d 140 (5th Cir. 1988)	9
California Coastal Commission v. Granite Rock, 480 U.S. 572 (1987)	18-19
Central Water Conservancy Dist. v. Simpson, 877 P.2d 335 (Colo. 1994)	2
Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970)	13
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)	19
City and County of Denver v. Board of County Comm'rs, 782 P.2d 753 (Colo. 1989)	3, 11
City and County of Denver v. Mountain States Tel. & Tel., 754 P.2d 1172 (Colo. 1988)	12-13
City of Charleston v. Public Serv. Comm'n, 57 F.3d 385 (4th Cir. 1995)	13
City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980)	9
City of Trenton v. New Jersey, 262 U.S. 182 (1923)	9, 10, 13
Coleman v. Miller, 307 U.S. 433 (1939)	8
Friends of the Earth v. United States Navy, 841 F.2d 927 (9th Cir. 1988)	18
Hammerstein v. Superior Court, 341 U.S. 491 (1951)	17
Harris v. Reed, 489 U.S. 255 (1989)	17
Illinois v. Gates, 462 U.S. 213 (1983)	15
MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986)	14
New Castle County School Dist. v. State, 424 A.2d 15 (Del. 1980)	9-10
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	14
Rogers v. Brockette, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979)	9, 10
Secretary of the Navy v. Avrech, 418 U.S. 676 (1974)	14

TABLE OF AUTHORITIES—Continued

Page

South Macomb Disposal Auth. v. Township of Washington, 790 F.2d 500 (6th Cir. 1986) 9
Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) 8,10
Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979) 17-18
Village of Arlington Heights v. Regional Transp. Auth., 653 F.2d 1149 (7th Cir. 1981) 9, 11
Wimberly v. Ettenberg, 570 P.2d 535 (Colo. 1977) .. 10
Yee v. City of Escondido, 503 U.S. 519 (1992) 15, 17

Federal Statutes, Rules, and Regulations

Clean Water Act of 1977, 33 U.S.C. § 1251, *et seq.*, Pub. L. 95-217, 91 Stat. 1566 ..... 3, 20
Colorado Wilderness Act, Pub. L. 96-560, 94 Stat. 3265 (1980) 3, 20
Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1761-1771 ..... 3, 4, 20
28 U.S.C. § 1257 ..... 14-15, 17
33 U.S.C. § 1344 ..... 3, 4
33 U.S.C. § 1370 20
43 U.S.C. § 1765 ..... 3-4, 20
36 C.F.R. § 251.56 4
33 C.F.R. § 320.4(g), (j) 4, 20

State Statutes, Rules, and Regulations

Colorado Land Use Act, Colo. Rev. Stat. § 24-65.1-101, *et seq.* 1-2, 3, 6
Colo. Rev. Stat. § 24-61.1-203 2
Colo. Rev. Stat. § 24-65.1-401 2
Colo. Rev. Stat. § 24-65.1-402 2
Colo. Rev. Stat. § 24-65.1-501 3

Executive Orders

Executive Order 11,990 (May 24, 1977) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-428

CITY OF COLORADO SPRINGS and CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS,
Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

---

BRIEF IN OPPOSITION OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO

The respondent Board of County Commissioners of Eagle County, Colorado (the "Board" or "Eagle County"), respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the opinion of the Colorado Court of Appeals in this case. That opinion was reported at 895 P.2d 1105 (1994), and has been reprinted in the appendix to the petition for writ of certiorari ("Pet. App.") at 1a.

COUNTERSTATEMENT OF THE CASE

Petitioners, the cities of Colorado Springs, Colorado, and Aurora, Colorado ("Cities"), applied for a permit from Eagle County under the Colorado Land Use Act,

Colo. Rev. Stat. § 24-65.1-101, *et seq.*, for construction of a system of water diversion structures to be located in the Eagle River Basin within Eagle County (the so-called Homestake Water Project). After a lengthy hearing, Eagle County denied the Cities' application, finding, among other things, that the project as proposed by the Cities would significantly deteriorate wetlands in violation of Eagle County regulations. Upon judicial review, the Colorado Court of Appeals held that there was competent evidence to support Eagle County's decision to deny the permit. The Colorado Supreme Court denied the Cities' subsequent petition for review on certiorari. The Cities seek this Court's review.

A. Regulation of Municipal Water Projects Under Colorado Law.

The Cities' proposed Homestake Water Project is a municipal water project involving the exercise of water rights held by the Cities under Colorado law. The Cities' water rights authorize the diversion of a prescribed amount of water from the Eagle River Basin. The manner and method of the Cities' appropriation of that water, however, is subject to regulation by the Colorado General Assembly. *See Central Water Conservancy Dist. v. Simpson*, 877 P.2d 335 (Colo. 1994).

In 1974, the Colorado General Assembly amended the Colorado Land Use Act to provide for regulation of certain matters of state interest, including the site selection, construction, and efficient utilization of municipal water projects. Colo. Rev. Stat. §§ 24-65.1-101, -203. By this enactment, the General Assembly delegated authority to county governments to directly regulate the environmental impacts of the construction and efficient utilization of municipal water projects. The county governments were to implement the statutory scheme through a permit program enacted and administered under statutory guidelines. Colo. Rev. Stat. §§ 24-65.1-401, -402,

-501. As noted by the Colorado Court of Appeals, *see* Pet. App. 5a-6a, Eagle County has developed such a permit program for the regulation of municipal water projects.

The Colorado Supreme Court has ruled that the statutory scheme provided in the Colorado Land Use Act for county regulation of matters of state interest is a constitutional delegation of legislative authority. *City and County of Denver v. Board of County Comm'rs*, 782 P.2d 753, 760, 763 (Colo. 1989). The court has further held that home rule cities, such as petitioners, are not insulated from regulation under the Colorado Land Use Act when they construct water projects in the exercise of their water rights. *Id.* at 764-65.

B. The Cities' Federal Permit Applications.

The Cities' proposed location for the Homestake Water Project—on federal land within the White River National Forest and the Holy Cross Wilderness—required the Cities to obtain certain federal approvals, which they elected to pursue before they applied for the permit from Eagle County under the Colorado Land Use Act. *See, e.g.*, Pet. at 7. First, although a statutory exemption saved the Cities' water project from an outright ban under the Colorado Wilderness Act, *see* Pub. L. 96-560, § 102(5), 94 Stat. 3265, 3266 (1980), the Cities nevertheless had to obtain an easement from the United States Forest Service pursuant to the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1761-1771. Second, because the Cities' proposed project would involve the discharge of dredged or fill material into wetlands that are part of the waters of the United States, authorization had to be obtained from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Both of these federal statutes and their implementing regulations require the Cities, as federal permittees, to comply with applicable state environmental protection requirements. *See* 33 U.S.C. § 1344; 43 U.S.C.

§ 1765; 33 C.F.R. § 320.4(g), (j); 36 C.F.R. § 251.56. In addition, pursuant to Executive Order 11,990 (May 24, 1977), any grant of an easement through federally owned wetlands must identify any uses of the easement that may be restricted under state or local wetland regulations.

The Cities obtained their federal approvals. However, consistent with the statutory and regulatory requirements and Executive Order 11,990, both the FLPMA easement issued by the Forest Service and the Section 404 permit issued by the Corps of Engineers prescribed conditions that either mandated compliance with state and local permitting requirements or made it clear to the Cities that federal approval did not obviate the requirement to obtain state or local permits under Colorado law. *See* Pet. App. 63a, 111a.

C. The Cities' State Permit Application.

In 1985, the Cities submitted an application for Eagle County's approval of a proposed system of water diversion and conveyance structures within the drainage of two tributaries to the Eagle River, Fall Creek and Cross Creek. As previously noted, *supra* p. 3, the Cities elected to seek authorization from Eagle County only after they had obtained the required federal permits.

In 1987, Eagle County held a public adjudicatory hearing on the Cities' application. Before it began, however, the Cities moved to restrict the scope of the hearing, filing a motion *in limine* that asserted that Eagle County lacked authority to consider alternatives to the specific project features proposed in the Cities' application. As noted by the Colorado Court of Appeals, *see* Pet. App. 25a, the hearing record is very clear that the Cities had no intention of altering any features of their project. In short, at their own election, the Cities' application was a "take it or leave it" proposition. Eagle County granted

the Cities' motion to restrict the scope of review of the application, thus foreclosing any review of the large number of potential alternatives to the project, some of which had been identified by the Cities and reviewed by the Forest Service during the federal permitting process.

As a consequence of the Cities' motion *in limine* and the Board's action thereon, the application review process did not involve a categorical determination of whether the Cities could exercise their water rights within the Eagle River Basin. Instead, the Board's review was confined to determining whether the specific project features described in the Cities' application would result in unacceptable environmental impacts. As noted by both the trial court and the Colorado Court of Appeals, *see* Pet. App. 23a, 186a, Eagle County's action on the Cities' permit application would affect the proposed project only and not the right of the Cities to construct and operate a water project within the boundaries of Eagle County.

As described in a transcript that runs to nearly 4,000 pages in length, the hearing involved extensive expert testimony and a large number of exhibits. Much of that evidence addressed the impact of the proposed project on wetlands within the Cross Creek and Fall Creek drainages. In the end, the Board unanimously denied the Cities' permit application, finding, among other things, that the project as proposed by the Cities would significantly deteriorate wetlands in the Fall and Cross Creek drainages in violation of Eagle County regulations that prohibited the significant deterioration of wetlands without adequate mitigation. *See* Pet. App. 145a, 147a, 150a.

D. Judicial Review of Eagle County's Action.

Following the Board's denial of the Cities' permit application, the Cities commenced an action for judicial review in the District Court of the Fifth Judicial District, State of Colorado. In total, the Cities' amended complaint in the District Court asserted fifteen claims for relief, includ-

ing claims that (i) the actions of Eagle County constituted regulatory takings without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II of the Colorado Constitution, and (ii) the regulations that Eagle County had relied upon in denying the Cities' application were pre-empted by federal law. The District Court dismissed the Cities' takings claims, concluding that the Cities lacked standing to assert such claims. Pet. App. 162a-72a. The District Court further held that some, but not all, of the regulatory grounds supporting Eagle County's action were pre-empted. Pet. App. 186a-88a. The District Court remanded the case to the Board for further consideration. *See* Pet. App. 211a.

Eagle County appealed the District Court's decision, contending, among other things, that (i) the District Court erred in finding that certain of the Eagle County regulations were pre-empted, and (ii) in any event, the regulatory grounds that the District Court found were not pre-empted were supported by competent evidence and, by themselves, required the Board to deny the Cities' application. The Cities cross-appealed on the District Court's dismissal of the Cities' takings claims. *See* Pet. App. 242a-43a.

On review, the Colorado Court of Appeals held that the record of proceedings before the Board contained competent evidence to support its determination that the Cities had failed to meet the applicable permit issuance criteria. Pet. App. 21a, 32a. The Court of Appeals noted that the record contained extensive testimony to support the finding that the Cities' plan to mitigate the impact of their water diversion in the affected wetlands was deficient and would be ineffective to prevent a substantial destruction of certain plant species in the area. Pet. App. 7a. The Court concluded that, in view of the mandate of the Colorado Land Use Act that a permit must be denied if all regulatory criteria cannot be met, the Cities' application must be denied. Pet. App. 6a-8a.

The Court of Appeals further held that the Cities' entitlement to take water from the Eagle River was not an absolute right to build and operate any particular water diversion project. Pet. App. 21a. In light of the limited nature of the Board's ruling (based on the Cities' own motion *in limine*), the Court of Appeals noted that the Cities were not barred from resubmitting a modified application or a different proposal. *Ibid.*

Finally, the Court of Appeals affirmed the District Court's dismissal of the Cities' takings claims on a number of grounds, including the Cities' lack of standing to pursue such claims. Pet. App. 29a-32a.

Because Eagle County's denial of the Cities' application was being sustained by the Court of Appeals solely on grounds that the District Court had found not to be pre-empted—a ruling that the Cities did not challenge on appeal—the Court of Appeals expressly declined to reach any issues of federal pre-emption. *See* Pet. App. 8a.

Rather than amend their application to propose an alternate configuration of their water project, the Cities sought review of the Court of Appeals' decision. On June 6, 1995, the Colorado Supreme Court denied the Cities' petition for writ of certiorari. *See* Pet. App. 214a-16a.

REASONS FOR DENYING THE WRIT

The petition presents two questions. The Cities first ask this Court to decide whether the Colorado Court of Appeals erred in ruling that the Cities lacked standing to assert takings claims against Eagle County in a Colorado state court. In effect, the Cities are asking this Court to consider overturning its own settled law regarding Fourteenth Amendment rights of state subdivisions in order to reach an issue of Colorado law regarding the standing of Colorado municipalities to bring claims in a Colorado state court. There is no reason for this Court to engage in such an extraordinary violation of *stare decisis* and federalism.

The Cities next ask this Court to decide whether federal law implicitly pre-empts all of Eagle County's attempts to regulate environmental effects of the Cities' water project. That issue was never raised in the Colorado Court of Appeals, and the Cities have not said why this Court should exercise its jurisdiction under 28 U.S.C. § 1257 to decide such an issue that was "not pressed or passed upon below," particularly where the federal statutes, regulations, and executive order that apply to this matter all expressly contemplate state and local regulation in these circumstances.

I. THE CITIES' STANDING TO ASSERT A TAKINGS CLAIM IN A COLORADO STATE COURT AGAINST ANOTHER STATE ENTITY IS NOT AN APPROPRIATE ISSUE FOR THIS COURT'S REVIEW.

A. The courts have consistently rejected the contention that a state subdivision, such as a municipality, has a federal constitutional right against uncompensated takings by another of that state's subdivisions.

The Cities state that a "genuine conflict currently exists" about whether one subdivision of a state may assert a federal takings claim against another subdivision. *See* Pet. at 10. But that's wrong. Since *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), this Court has repeatedly counseled that the Constitution of the United States does not interfere with a state's internal political organization. This Court has remained faithful to the principles of *Dartmouth College* in its construction of the Fourteenth Amendment, holding that a state subdivision, such as a municipal corporation, is merely a creature of the state, and is not a "person" that may assert its own Fourteenth Amendment rights against the will of its creator. *See Coleman v. Miller*, 307 U.S. 433, 441 (1939). The subdivision's inability to bring claims against its creator under the Fourteenth Amendment also operates to bar takings claims that are based on the Just Compensation Clause of the Fifth

Amendment, which applies as a constraint on the states through the Fourteenth Amendment. *See, e.g., City of Trenton v. New Jersey*, 262 U.S. 182, 183, 188 (1923). Moreover, the subdivision's inability to assert Fourteenth Amendment rights against its creator extends to suits directed against other subdivisions of the creating state. *See, e.g., South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986); *Village of Arlington Heights v. Regional Transp. Auth.*, 653 F.2d 1149, 1153 (7th Cir. 1981); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980).

Contrary to the Cities' suggestion, *see* Pet. at 10, recent opinions in the lower courts have not questioned the continuing validity of the well-settled law that a state subdivision has no federal constitutional rights against uncompensated takings by its creator or a subdivision thereof. In fact, the cases cited by the Cities expressly point out the absence of any support for such takings claims. *See, e.g., Board of Levee Comm'rs v. Huls*, 852 F.2d 140, 142-43 (5th Cir. 1988) (in holding that "an agency of the state [may not] sue the state under the Fifth and Fourteenth Amendments for an uncompensated taking of property," the court said that it could not discover *any* case that "ever found that a political subdivision properly asserted its constitutional rights to just compensation against its state"); *Rogers v. Brockette*, 588 F.2d 1057, 1067-68 (5th Cir.) (observing that federal courts have "invariably" ruled against "the municipality's claim that the state action violated the municipality's rights under . . . the just compensation clause"), *cert. denied*, 444 U.S. 827 (1979). The Cities cite just one state court opinion, *New Castle County School Dist. v. State*, 424 A.2d 15 (Del. 1980), that even *suggests* that it might entertain such a claim. *See* Pet. at 12-13. A closer examination of that case, however, reveals that the takings claims asserted therein had been raised under both state and federal constitutions, and the defendant

state did not dispute plaintiff's contention that compensation would be required if the court found that the property that was being "taken" by the state had been held by the plaintiff in its proprietary rather than governmental capacity. *See* 424 A.2d at 16-17. The court consequently never had to reach any issue about the applicability of federal takings law. Such a case can hardly be said to establish a "genuine conflict" in federal constitutional law that this Court must now resolve.

B. The federal law of standing does not determine whether a Colorado municipality may assert a takings claim against another Colorado state subdivision in a Colorado state court.

The Cities casually dismiss this Court's teachings in *Dartmouth College* and its progeny with the facile observation that, "when these cases were decided, 'standing' meant something different from what it means today." *See* Pet. at 19-20 (citing *Rogers*, 588 F.2d at 1057). The Cities apparently believe that a change in the federal law of standing somehow undercuts two hundred years of case law regarding the constitutional rights of state entities.

The Cities are confused. First, changes in the federal law of standing—that is, changes in the law about who might be an appropriate party to bring a particular claim in federal court—do not themselves create new constitutional rights in municipalities against uncompensated takings by other state entities. This Court's holding in *City of Trenton* remains good law.

Second, this case was filed in a Colorado state court, and is therefore governed by that state's rules of standing, which need not be—and, as it happens, are not—identical to the rules of standing to assert claims in a federal court that exercises its jurisdiction under Article III of the Constitution of the United States. *Wimberly v. Ettenberg*, 570 P.2d 535, 537-39 (Colo. 1977).

C. The Cities' status as "home-rule" cities under the Colorado constitution does not undermine the reasoning of the Colorado Court of Appeals and, in any event, raises no federal issues for this Court's review.

The Cities suggest that, because they are "home-rule" cities under the Colorado constitution and therefore have certain powers that may not be abrogated by the Colorado General Assembly, their takings claims relate to vested rights that are constitutionally protected from infringement by the state. *See* Pet. at 21. But they're wrong. As the Colorado Court of Appeals recognized, *see* Pet. App. 30a-31a, it is only in matters of purely local concern that the powers of a home-rule city supersede the powers of the Colorado General Assembly. *See, e.g., City and County of Denver v. Board of County Comm'rs*, 782 P.2d at 762. In matters of mixed state and local concern, the powers of the Colorado General Assembly will always control and supersede any conflicting powers of a home-rule city. *Ibid.* In this regard, the Colorado Supreme Court has expressly and specifically found that a home-rule city's construction and operation of a water project in Eagle County is a matter of mixed state and local concern, such that the Colorado General Assembly's delegation to Eagle County of regulatory authority over that water project does not improperly infringe on the home-rule city's right, under the Colorado constitution, to construct and operate waterworks. *Id.* at 761-63.

Eagle County's exercise of its delegated state power cannot now be attacked on the basis that a home-rule city has some sort of inalienable right to be free from such state control—much less a right that is enforceable through the Fourteenth Amendment to the Constitution of the United States. *Cf. Village of Arlington Heights*, 653 F.2d at 1152-53 (holding that, although the home-rule provisions of the Illinois constitution changed the relationship of the state to the home-rule cities in many respects, the state retained a general power of control, such that the

home-rule city could not assert a claim under the Fourteenth Amendment against the state or any of the state's political subdivisions). The Cities have cited no authorities that have expressed any view to the contrary, and have given this Court no reason to invest its resources in an exploration of the implications of home-rule status under Colorado law. *See* Pet. at 21.

D. The Cities' distinction between a municipality's "proprietary" and "governmental" capacities raises only state-law issues that are inappropriate for this Court's review.

The Cities contend that they "are acting in their proprietary capacity as the owners and developers of decreed conditional water rights" under Colorado law, and therefore must, under Colorado law, "be treated essentially the same as a private corporation." *See* Pet. at 21-22. They suggest that—under this alleged Colorado rule of "essentially equal treatment"—if a private corporation can assert a takings claim against the state, then *they* should be permitted to assert *their* takings claims as well. *Id.* at 22. They apparently think that this Court is the appropriate forum in which to vindicate their contentions.

The Cities are, of course, mistaken. First, as the Colorado Court of Appeals recognized, *see* Pet. App. 31a, the governmental/proprietary distinction arises out of state common law, and in Colorado, its viability is open to serious question. *See City and County of Denver v. Mountain States Tel. & Tel.*, 754 P.2d 1172, 1173-76 (Colo. 1988). Moreover, as the Colorado Supreme Court has observed, *ibid.*, the distinction cannot be applied with a broad brush. Thus, a municipality's operation of a waterworks may be considered an exercise of its proprietary capacity in a case that concerns the provision of water to persons living outside city limits, but may at the same time be considered an exercise of its governmental capacity in cases involving the construction and relocation of facilities for treating or transporting water. *See id.* at 1775-77. In the instant case, the Cities have cited no

cases to support their contention that their planning or construction of extraterritorial waterworks is carried out in their proprietary capacity, nor have they provided any authority for the contention that Colorado municipalities engaged in proprietary functions thereby acquire rights against uncompensated takings that are enforceable under the Fourteenth Amendment. Furthermore, as the Colorado Court of Appeals noted, Pet. App. at 31a-32a, this Court has already rejected the governmental/proprietary distinction as a basis for permitting a municipality to assert Fourteenth Amendment rights. *See City of Trenton*, 262 U.S. at 188-92; *see also City of Charleston v. Public Serv. Comm'n*, 57 F.3d 385, 388-89 (4th Cir. 1995) (pointing out that this Court in *City of Trenton* "soundly rejected" the governmental/proprietary distinction in the context of a city's assertion of constitutional claims against its "creator" state). The Cities have given this Court no reason to revisit the governmental/proprietary distinction here.

E. Even if the Cities arguably had standing to assert takings claims, Eagle County's denial of a permit here clearly did not amount to a taking.

As discussed above, Eagle County believes that there are no difficult or substantial questions of federal law raised by the ruling of the Colorado Court of Appeals denying that the Cities had standing to assert their takings claims. For the sake of completeness, however, Eagle County would also point out "the propriety of avoiding difficult standing questions when, as here, even assuming a party has standing, it 'has not made a case' for the relief sought." *City of Charleston*, 57 F.3d at 390 n.5 (quoting *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 89 (1970)). In this case, the Cities' takings claims are based solely on Eagle County's denial of a permit for a single, specific water project that the Cities had proposed. Eagle County has not indicated that it will reject any alternative proposals that would

allow the Cities to exercise their water rights within the Eagle River Basin; indeed, the Cities themselves precluded any consideration of alternatives through their successful motion *in limine*. *See supra* pp. 4-5. But "[i]t follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted . . . . A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Because the Cities' takings claims have clearly been asserted prematurely, *cf. id.*, 477 U.S. at 351-52 (regulatory taking not established where county board of supervisors had merely denied one proposal for subdividing the subject property), this case presents a singularly unattractive vehicle by which to resolve any standing issues that have been raised. *Cf. Secretary of the Navy v. Avrech*, 418 U.S. 676, 677-78 (1974) ("[W]e are unwilling to decide the difficult jurisdictional issue which the parties have briefed. . . . We believe that even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is . . . foreordained.").

II. THE CITIES' CLAIM THAT FEDERAL LAW PREEMPTS EAGLE COUNTY'S REGULATIONS, WHICH WAS "NOT PRESSED OR PASSED UPON BELOW," RAISES NO ISSUES FOR THIS COURT'S REVIEW.

A. Because the Cities' claim of pre-emption was not pressed or passed upon in the Colorado appellate courts below, there is no basis for this Court's review of the claim under 28 U.S.C. § 1257.

This Court's certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. § 1257, which provides that "[f]inal judgments or decrees rendered by the

highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari" where a federal question has been raised. *See* 28 U.S.C. § 1257. "[W]ith very rare exceptions," this Court has refused to exercise its jurisdiction under § 1257 to consider petitioners' claims that were not raised or addressed in the state courts below. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *see also Illinois v. Gates*, 462 U.S. 213, 217-24 (1983) (discussing "the so-called 'not pressed or passed upon below' rule" governing this Court's exercise of jurisdiction under § 1257). A brief review of the record below demonstrates the absence of a reviewable ruling here on the claim of federal pre-emption.

At the district court level, the Cities challenged Eagle County's actions on the grounds of pre-emption. The District Court ruled in favor of the Cities in part, holding that certain criteria used by Eagle County in denying the permit were, in fact, pre-empted. Pet. App. 184a-86a. The District Court, however, found that other criteria utilized by Eagle County were not pre-empted. Specifically, the District Court found that Eagle County had the right to deny the Cities' application on evidence of unacceptable environmental damage to wetlands and aquatic habitats. Pet. App. 186a-87a.

Eagle County appealed that portion of the District Court's judgment that found certain of its criteria pre-empted. Pet. App. 240a-41a. The Cities, however, did not challenge the District Court's ruling that Eagle County's criteria concerning environmental damage to wetlands and aquatic habitats were not pre-empted. Pet. App. 242a-43a. In its opinion, the Colorado Court of Appeals found that it did not need to decide the issue of federal pre-emption raised by Eagle County, because the criteria that the District Court had found not to be pre-empted provided adequate grounds for reversing the District Court and upholding Eagle County's actions. Pet. App. 8a. Of course, because the Cities had not chal-

lenged the District Court's ruling against pre-emption of Eagle County's environmental criteria relating to wetlands and aquatic habitats, the Court of Appeals never considered or ruled on that issue.

In apparent recognition of their failure to appeal the District Court's ruling that Eagle County's environmental regulations relating to wetlands and aquatic habitats were *not* pre-empted, the Cities attempt to bring the issue before this Court based on Eagle County's appeal of the District Court's holding that certain *other* regulations *were* pre-empted.[1] Indeed, the Cities acknowledge that there was no appellate ruling on the pre-emption issue that they are now raising when they state that "by *implicitly assuming* that federal law did not preempt the county's denial decision, the Colorado Court of Appeals' opinion clashes with decisions by the Ninth Circuit and this Court." Pet. at 14 (emphasis added). Moreover, in their petition for certiorari to the Colorado Supreme Court, the Cities expressly acknowledged that the Court of Appeals did not "even reach this issue." Pet. App. 267a.[2] The

[1] To provide documentary support for the contention that their pre-emption issue was raised below, the Cities rely on some creative cutting and pasting of Eagle County's notice of appeal to the Colorado Court of Appeals. Either inadvertently or deliberately, when the Cities cut and pasted the notices of appeal for the appendix to their petition, they left out any indication of which party's notice of appeal raised an issue of federal pre-emption. *See* Pet. App. 240a-41a. In fact, the notice of appeal that included the issue of federal pre-emption was Eagle County's. In the notice of appeal filed by the Cities, federal pre-emption was not raised. *See* Pet. App. 242a-43a.

[2] Once again, through creative cutting and pasting, the Cities attempt to create the impression that they presented the issue of federal pre-empion for review—this time in their petition to the Colorado Supreme Court. Yet, the only reference to federal pre-emption in their nineteen-page petition to the Colorado Supreme Court is the one sentence that they have now pasted in their appendix under the heading of "Issues Presented for Review." *See* Pet. App. 267a. In fact, this one-sentence "issue" did *not* appear as an "issue presented for review" in the petition to the Colorado

Cities assert that the Court of Appeals "refused" to reach the issue; in truth, the Cities did not ask that the issue be reached.

Accordingly, the Cities have not preserved any issue of pre-emption beyond the District Court. The issue has not been fully briefed or considered in the appellate courts of Colorado, and it would be beyond this Court's jurisdiction to be the first court to review a ruling by the lowest state court of general jurisdiction. Having failed to appeal the District Court's ruling, the Cities are precluded from obtaining this Court's review under 28 U.S.C. § 1257. *See, e.g., Hammerstein v. Superior Court*, 341 U.S. 491, 491-92 (1951). Moreover, this Court has consistently refused to consider issues of federal law on direct review from a state court judgment if, as here, that judgment rests on an adequate and independent state law ground. *Harris v. Reed*, 489 U.S. 255, 260-61 (1989). Nothing unique or special about this case compels deviation from the jurisdictional and prudential limitations on this Court's certiorari review.

B. The District Court ruling against pre-emption does not conflict with a decision of a state court of last resort or a federal court of appeals.

The Cities assert that the Colorado Court of Appeals' "implicit assumption" against pre-emption clashes with the Ninth Circuit's decision in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979). Even if the Cities had preserved the pre-emption issue for this Court's review, however, that alleged conflict would not merit such review. First, *Ventura County* is inapposite to the facts of this case. In *Ventura County*, the local gov-

---

Supreme Court; rather, it appeared on page 13 of the text of that document. Of course, even if the petition to the Colorado Supreme Court had raised pre-emption as an issue for review, that court's denial of discretionary review on the issue would not constitute a ruling on the merits for purposes of this Court's review under § 1257. *See Yee*, 503 U.S. at 533.

ernment had sought what the court described as the "immediate recognition and implementation of its veto power"—"the power of ultimate control"—over a lessee of the federal government. *See* 601 F.2d at 1084-85. Here, however, Eagle County has never contended that it could prohibit or veto the Cities' water project under any circumstances. Rather, as the Colorado Court of Appeals correctly observed, *see* Pet. App. 11a-12a, Eagle County merely sought compliance with its duly authorized and enacted regulations.

Second, in relying upon *Ventura County*, the Cities ignore the more recent Ninth Circuit decision of *Friends of the Earth v. United States Navy*, 841 F.2d 927 (9th Cir. 1988), which upheld regulations similar to Eagle County's. In *Friends of the Earth*, the Ninth Circuit held that a state statute that combined land use and environmental regulations was not pre-empted, because the state regulation did not mandate any particular use of the land, but only imposed conditions to mitigate damage caused by the project. *See* 841 F.2d at 936. Significantly, the Ninth Circuit in *Friends of the Earth* relied heavily upon *California Coastal Commission v. Granite Rock*, 480 U.S. 572 (1987), which was decided by this Court eight years after the Ninth Circuit's decision in *Ventura County*. *Friends of the Earth* is the controlling law of the Ninth Circuit, and the District Court's ruling against pre-emption here is entirely consistent with that opinion.

C. The District Court ruling against pre-emption is consistent with applicable decisions of this Court.

The Cities assert that the "implicit assumption" of the Colorado Court of Appeals against pre-emption clashes with the "direction taken" by this Court in *Granite Rock*. In fact, however, a finding against pre-emption here is entirely consistent with *Granite Rock*.

In the present case, as in *Granite Rock*, the regulations at issue set limitations on the environmental impact of the Cities' project on Eagle County. Although the Cities attempt to characterize this as a "veto" of their project, that characterization is simply not supported by the record. As the Colorado Court of Appeals recognized, *see* Pet. App. 21a, 23a-26a, the Cities themselves precluded any meaningful review of alternative means and methods of developing their water rights with their successful motion *in limine*, which demanded that Eagle County consider no alternatives to their specific proposal. When that proposal failed to comply with applicable regulations, Eagle County was obligated by state statute to reject the application.

Similarly, in *Granite Rock*, the local commission did not seek to veto or prohibit activity; it simply sought the authority to impose certain reasonable environmental controls—an authority that, on its face, could not be said to conflict with federal law. The District Court's recognition that Eagle County could permissibly regulate aspects of the Cities' water project here fully comports with this Court's rulings in *Granite Rock*.

D. The District Court correctly rejected the Cities' blanket claim that Eagle County's environmental regulations were pre-empted.

At the outset, the Cities bore the burden of overcoming the presumption against the pre-emption of Eagle County's regulations. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (presumption against the pre-emption of state law regulation). The Cities failed to meet that burden.

First, the federal permits issued to the Cities expressly *required* the Cities to comply with all state and local regulations. The Forest Service expressly conditioned the issuance of its grant of an easement on the Cities' meeting "all Federal, State, and local requirements for permitting"

before commencing construction of their project. *See* Pet. App. 63a (Forest Service Record of Decision). In particular, three Eagle County permits, including the one sought by the Cities in the present case, were recognized by the Forest Service as necessary prerequisites. Pet. App. 67a. Similarly, the permit issued by the Department of the Army expressly provided that "this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein." Pet. App. 111a.

Second, the relevant federal statutes likewise expressly preserve Eagle County's right to regulate the environmental impacts of the Cities' project. *See* 33 U.S.C. § 1370 (Clean Water Act preserves rights of states and their political subdivisions to enact more stringent requirements); 33 C.F.R. § 320.4(j) (1993) (same); 43 U.S.C. § 1765(a)(iv) (Federal Land Policy Management Act requires compliance with more stringent state environmental standards as a condition of federal right-of-way permits).

Finally, there is no merit to the Cities' assertion, *see* Pet. at 28-29, that Eagle County's actions conflict with an exemption provided in the Colorado Wilderness Act. The exemption cited by the Cities simply allowed them to construct their water project as if the location of the project had not been designated as a wilderness area. The exemption did not grant them an absolute and unfettered right of development. In fact, the exemption specifically stated that the Cities' rights would not be "prejudiced, *expanded*, diminished, altered, or affected by this Act." Pet. App. 313a (emphasis added). The exemption further stated that it was not to be construed to "*expand*, abate, impair, impede, or interfere with" the construction of the project. *Ibid.* (emphasis added). Nothing in the exemption stated that the Cities would not have to comply with local authority, as the Forest Service and the Army permits expressly required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES R. FRITZE
Eagle County Attorney
P.O. Box 850
Eagle, CO 81631
(303) 328-8600

BARBARA J. B. GREEN
1800 Glenarm Place
Suite 1400
Denver, CO 80202
(303) 296-6400

HENRY W. IPSEN *
MARY HURLEY STUART
WALTER H. SARGENT
HOLME ROBERTS & OWEN LLC
1700 Lincoln, Suite 4100
Denver, CO 80203
(303) 861-7000

Counsel for the respondent Board of County Commissioners of the County of Eagle, State of Colorado

* Counsel of Record

Supreme Court, U.S.
FILED
NOV 22 1995
CLERK

(6)

No. 95-428

In The

Supreme Court of the United States

October Term, 1995

CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

REPLY BRIEF OF THE CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS

JOHN M. DINGESS
DUNCAN, OSTRANDER & DINGESS, P.C.
7800 East Union Avenue
Suite 200
Denver, CO 80237

GREGORY L. JOHNSON
Assistant City Attorney, Utilities
30 S. Nevada, Suite 601
Colorado Springs, CO 80903

MARK T. PIFHER*
JONATHAN C. DEHMLOW
ANDERSON, DUDE, PIFHER & LEBEL, P.C.
104 S. Cascade Avenue
Suite 204
Colorado Springs, CO 80903
(719) 632-3545

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

24 pp

TABLE OF CONTENTS

Page

I. RESPONDENTS HAVE MISSTATED THE OPERATIVE FACTS 1

II. THIS COURT SHOULD REVIEW THE ISSUE OF MUNICIPAL STANDING UNDER THE FIFTH AMENDMENT..... 6

III. THE ISSUE OF FEDERAL PREEMPTION IS PROPERLY BEFORE THIS COURT 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Angel v. Bullington, 330 U.S. 183 (1947) 10

Brubaker v. Board of County Comm'rs, 652 P.2d 1050 (Colo. 1982) 5, 9

California Coastal Commission v. Granite Rock, 480 U.S. 572 (1987) 4, 5

City of Northglenn v. City of Thornton, 193 Colo. 536, 569 P.2d 319 (1977) 8

Doremus v. Board of Education, 342 U.S. 429 (1952) 7

Flast v. Cohen, 392 U.S. 83 (1968) 8

International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986) 10

MacDonald, Sommer and Frates v. County of Yolo, 477 U.S. 340 (1986) 9

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 7

Mesa Verde Co. v. Montezuma County, 831 P.2d 482 (Colo. 1992) 8

New Castle County School District v. State, 424 A.2d 15 (Del. 1980) 6

Singleton v. Wulff, 428 U.S. 106 (1976) 8

Street v. New York, 394 U.S. 576 (1964) 10

Town of Orchard City v. Board of Delta County Commissioners, 751 P.2d 1003 (Colo. 1988) 7

Webb v. Webb, 451 U.S. 493 (1981) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Section 24-65.1-106(1)(b) C.R.S. (1990) 8

CONSTITUTIONAL PROVISIONS:

U.S. Const. 5th Amendment 7

U.S. Const. 14th Amendment 7

OTHER AUTHORITIES:

59 Am.Jur.2d, Parties, § 30 (1987) 8

Charles A. Wright et. al., Federal Practice and Procedure, § 4021 (1977) 9

Petitioners, City of Colorado Springs, Colorado, and the City of Aurora, Colorado hereby file their reply brief in accordance with the provisions of Rule 15.6 of the rules of this Court.

I. RESPONDENTS HAVE MISSTATED THE OPERATIVE FACTS.

Before responding to those new arguments raised in the Respondents' briefs, it is incumbent upon the cities to bring to this Court's attention certain misstatements of fact contained therein.

First, the Board of County Commissioners of the County of Eagle ("Eagle County") misstates facts in an effort to prove that no taking has occurred on this record.[1] Attempting to show that the cities may have alternative uses for their water rights which are not affected by the permitting process, Eagle County states that " . . . the cities moved to restrict the scope of the hearing, filing a Motion in Limine that asserted that Eagle County lacked authority to consider *alternatives to the specific project features* proposed in the cities' application." (emphasis added) Eagle County Br. in Opp'n at 4. This is untrue. Rather, the cities merely moved to exclude evidence as to "alternative projects," i.e., completely different projects located at different sites, such as those explored in the alternatives analysis which was a part of

---

[1] The misstatement creates confusion, but ultimately serves little purpose. As discussed below, the question presented to this Court is not whether a taking in fact has occurred, but whether the Cities have standing to challenge a taking. *See infra* pp. 8-9.

the federal EIS process.[2] Eagle County voluntarily *granted* the motion, stating:

> The following is our ruling on Motion No. 2 filed by the Cities. The Cities had requested that evidence pertaining to the alternative projects not be considered in this hearing. It is our view that there are two categories of evidence on alternative projects: One, the first category pertains to alternative projects totally different and referring to totally different projects.
>
> Number two, *the second category refers to alternative features* within the general scope purviewed under the pending application. The first category of evidence includes testimony to the effect that, rather than construct the Homestake II Project or some variant of it, the Cities should build the Eagle-Piney Project or participate in the Green Mountain Exchange. We rule that evidence on this nature – of this nature will not be admitted.
>
> But two, *the second category pertaining to the features of the project,* to this extent, evidence submitted indicates that alternatives to the proposed project will mitigate environmental

---

[2] It must not be forgotten that the cities' federal permits, water right decrees, and Congressional exemption were all tied to the specific project for which an application was filed. The County's statement that "[a]s a consequence of the cities' motion in limine and the Board's action thereon, the application review process did not involve a categorical determination of whether the cities could exercise their water rights within the Eagle River Basin," ignores the fact that the entire "Basin" covers a large geographic area, well beyond the County boundaries, and encompasses extensive river reaches upon which the cities held no appropriative water rights.

> consequences of the project, including damage to the wetlands, water quality, solid waste disposal and so forth. *We believe that such evidence should be admitted in the record. As a matter of fact, even in the Cities' briefs and their motion they conceded that this type of evidence is contemplated in the submittal requirements of the regulation.* (emphasis added)

Transcript of Public Hearing, Volume V, April 24, 1987 at pp. 1136-1137. Hence, evidence was received relative to changes in project features for purposes of mitigating environmental impacts.

Second, on a related note, Eagle County states that the cities' application was a "take it or leave it" proposition. Eagle County Br. in Opp'n at 4. This also is categorically untrue. The cities, in conjunction with their participation in the extensive County hearing process, tendered mitigation proposals in a variety of areas, including: the movement of trails away from water diversion sites, basin-wide cleanup efforts associated with mine runoff, implementation of no wetland loss requirements, use of manual labor rather than heavy equipment, assistance with downstream water treatment costs, payment of additional security costs associated with project construction, noise abatement measures, changes in truck and other equipment scheduling, establishment of buffer zones for sediment control, water quality monitoring, and aquatic life monitoring. Over 200 pages of transcript testimony was presented to the Colorado Court of Appeals on these matters. Combined Answer and Reply Br. of Cities of Aurora and Colorado Springs, Addendums 30, 31 and 41, 93CA386 and 93CA412.

Third, Eagle County states that "the cities next ask this Court to decide whether federal law implicitly preempts all of Eagle County's attempts to regulate environmental effects of the cities' water project." Eagle County Br. in Opp'n at 8.[3] The cities have not made such an argument. Rather, the cities have conceded that regulatory entities may impose reasonable environmental mitigation conditions in accordance with this Court's decision in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987). See App. 249a-256a, 263a. However, the County is not free to deny a land use permit for a federally approved project located entirely on federal lands.

Fourth, both Eagle County and the Holy Cross wilderness Defense Fund ("Fund") claim that the cities never preserved for appeal the question of federal preemption. A review of the record below discloses that this assertion is also false. The Eagle County District Court entered findings *favorable* to the cities' federal preemption argument, i.e., that the County lacked the power of denial.

> Section III of the Board's Resolution was a denial of a special use permit. As stated above, the County does not have the authority to deny land use on federal land which has been approved by the federal agencies with responsibility for regulating the federal land in question. . . . The Board *may regulate activities which cause environmental impacts* but not completely prohibit a federal land use. (emphasis added)

---

[3] Eagle County makes the same erroneous statement at p. 19 of its Brief in Opposition.

App. 188a-189a. The District Court reiterated its prior conclusion in its decision following remand:

> . . . Furthermore, the holdings in *California Coastal Commission v. Granite Rock*, 480 U.S. 572 107 S.Ct. 1419, 94 L.Ed 2d 577 (1988) and *Columbia Basin Land Protection Ass'n v. Schlessinger*, 643 F.2d 585 (9th Cir. 1981) support their [cities] contention that a county may not deny a permit to operate a federally approved project on federal land.

App. 201a, 320a-329a. The district court then ruled in favor of the cities, finding that the County had acted unlawfully in denying the requested land use permits. App. 203a-205a.

On appeal, the County raised the issue of "whether the Board is prohibited on federal preemption grounds from regulating federally-approved activities on U.S. Forest Service lands in order to mitigate or reduce their environmental impacts. . . . " App. 241a.[4] In response, the cities noted that the district court had properly relied upon the decisions in *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050 (Colo. 1982) and *Granite Rock, supra*, with respect to the issue of denial as a matter of federal preemption. Though it may be possible to impose "reasonable state environmental regulations," the County could not seek to prohibit the activity on federal lands by *denying* the permit. App. 252a-256a. When the Colorado

---

[4] The cities did seek clarification from the Colorado Court of Appeals as to whether denial was appropriate under the Colorado Constitution and state statues, noting at page 10 of its Opening Brief that the lower court had already addressed the issue in the context of federal preemption. See App. 201a.

Court of Appeals reversed the district court decision and found in favor of the County, the cities argued that it should reconsider its decision, for though the regulation of environmental impacts may be appropriate, the County could not veto or deny the permits for the federally approved project located on federal lands. App. 263a-264a.[5]

II. THIS COURT SHOULD REVIEW THE ISSUE OF MUNICIPAL STANDING UNDER THE FIFTH AMENDMENT.

The County argues that, in deciding whether a conflict exists, this Court should ignore the Delaware Supreme Court's decision in *New Castle County School District v. State,* 424 A.2d 15 (Del. 1980). It contends that the Delaware Supreme Court "never had to reach any issue about the applicability of federal takings law" because the court could have decided the case under state law grounds. Eagle County Br. in Opp'n at 10. What the Delaware court could have done, however, does not matter. The court did rule on the federal question. It held that "the federal and the state law questions are essentially one and the same." 424 A.2d at 16. It then concluded that, under both standards, "property which is held in a proprietary capacity cannot be taken by the State unless just compensation is paid." 424 A.2d at 17. That holding creates a genuine conflict.

---

[5] The cities similarly raised the issue in their Petition for Certiorari to the Colorado Supreme Court. App. 267a.

The County also asserts that state law, rather than federal law, determines whether a Colorado municipality may assert a takings claim against another Colorado state subdivision in a Colorado state court. This contention lacks merit. It is true that state court standing rules may differ from the rules in federal court. *See, e.g., Doremus v. Board of Education*, 342 U.S. 429 (1952) (taxpayers lack standing in federal court even if they have it in state court). In this case, however, the Colorado Court of Appeals did not base its decision that cities lack standing on any state law standing rules. Instead, it interpreted the Fifth and Fourteenth Amendments as not granting the cities any constitutional rights against the County.[6] The proper interpretation of the Constitution is a question of federal law appropriately decided by the Supreme Court. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819).

Respondents also misconstrue the position of the cities concerning the significance of their "home rule" status, and the importance of the fact that they are operating in their proprietary capacity in the construction and operation of this water project. Respondents claim that neither contention raises a federal issue, and therefore this Court should refrain from exercising its jurisdiction. Eagle County Br. in Opp'n at 11-12. This argument misses the point. The question is whether the original "creatures

---

[6] The court below based its decision on *Town of Orchard City v. Board of Delta County Commissioners*, 751 P.2d 1003 (Colo. 1988). That case relied solely on federal authorities to determine the standing of a municipality to assert Fourteenth Amendment rights. *See* 751 P.2d at 1006 n.3.

of the state" reasoning, upon which this Court's early standing cases rests, remains viable in view of the cities constitutionally created home rule status and the nature of their actions in purchasing the water in question and constructing a project to deliver that water to their citizens. Simply stated, it does not. See Petition for Writ of Cert. at 21; *Mesa Verde Co. v. Montezuma County*, 831 P.2d 482, 485 (Colo. 1992); *City of Northglenn v. City of Thornton*, 193 Colo. 536, 542, 569 P.2d 319 (1977) (it is well settled that a city in operating a water works system acts in its proprietary capacity and is largely governed by the same rules that apply to a private corporation).

Finally, Respondents would have this Court reach the merits of the cities' taking claim.[7] However, as this Court has previously observed, it is improper to review the merits of a case where the final order in the case is dismissed for lack of standing, and the facts have not been sufficiently developed in the trial court. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968); 59 Am.Jur.2d, Parties, § 30 (1987) (when standing is put in issue, the question is whether the person whose standing is challenged is a

---

[7] Contrary to the statements found in the Fund Brief in Opposition at pp. 4-5, the lower courts never reached the question of "harm" to the cities water rights in the takings context, having ruled adversely to the cities on the procedural standing question. The Court of Appeals merely held that application of the County regulations to the cities' water project did not constitute an impermissible act under the pertinent provisions of state law, i.e., Section 24-65.1-106(1)(b), C.R.S. (1990) See App. 20a. The Court never had before it the factual record necessary to determine if there had been a temporary or permanent, partial or complete, taking of the cities' water rights.

proper party to request an adjudication of the issue and not whether the controversy is otherwise justifiable or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded).[8]

III. THE ISSUE OF FEDERAL PREEMPTION IS PROPERLY BEFORE THIS COURT.

As noted at the outset of this Reply, Respondents are in error when they claim that the cities have not properly preserved the federal preemption issue for review. See pp. 3-5, *infra*. See also *Webb v. Webb*, 451 U.S. 493, 501 (1981) (Supreme Court can review question adequately presented to state court, but not squarely addressed and therefore "silently resolved . . . against the petitioner.") Moreover, Respondents' assertion that the judgment below "rests on an adequate and independent state law ground," is puzzling at best. Eagle County Br. in Opp'n at 17.[9] Where federal preemption would preclude local permit denial decisions based on a state statute, preemption becomes a threshold question which must be answered *before* state law can be applied. See, e.g., *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050, 1057 (Colo. 1982) (a

---

[8] The decision cited by Respondents, *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340 (1986) simply underscores the problem with Respondents' argument. As noted in the *Yolo* dissent, "a regulatory takings determination is closely tied to the facts of a particular case. . . . " *Id.* at 359. In this instance, all of those facts have not yet been disclosed.

[9] The independence and adequacy of the state ground upon which the lower court decision is based is itself a federal question for review by this Court. Charles A. Wright et al., Federal Practice and Procedure, § 4021 (1977).

state law is not applicable if it is preempted). Furthermore, it is always a *federal* question whether federal law has superseded state law.[10] *Angel v. Bullington*, 330 U.S. 183, 189 (1947); *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 398 (1986); see also *Street v. New York*, 394 U.S. 576, 583 (1964) (issue of whether federal question was properly raised in state court is itself a federal question). Thus, this Court should review the federal preemption issue.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN M. DINGESS
DUNCAN, OSTRANDER, & DINGESS, P.C.
7800 East Union Avenue
Suite 200
Denver, CO 80237

GREGORY L. JOHNSON
Assistant City Attorney, Utilities
30 S. Nevada, Suite 601
Colorado Springs, CO 80903

MARK T. PIFHER*
JONATHAN C. DEHMLOW
ANDERSON, DUDE, PIFHER & LEBEL, P.C.
104 S. Cascade Avenue
Suite 204
Colorado Springs, CO 80903
(719) 632-3545

*Counsel of Record

[10] Respondent does not refute the observation in Petitioners' Opening Brief that the specific consideration of "wilderness" values by the County and the court below, App. 147a-148a, was contrary to the clear Congressional directive that the project should be treated as if it were located on Forest Service lands free of the wilderness designation. Petition for Writ of Cert. at 28-29.

DISTRICT COURT, COUNTY OF EAGLE,
STATE OF COLORADO

Civil Action No. 88CV142

RESPONSE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

CITY OF COLORADO SPRINGS AND CITY OF AURORA, Colorado municipal corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under §24-65.1-101, *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;
11. DIVISION OF WILDLIFE, STATE OF COLORADO;
12. EAGLE COUNTY SHERIFF, in his official capacity;
13. HOLY CROSS WILDERNESS DEFENSE FUND;
14. JAMES FRANKLIN LAMONT;
15. RED CLIFF WATER AND SANITATION DISTRICT;
16. TOWN OF EAGLE, COLORADO;

17. TOWN OF GYPSUM, COLORADO;
18. TOWN OF MINTURN, COLORADO;
19. TOWN OF REDCLIFF, COLORADO;
20. TOWN OF VAIL, COLORADO;
21. UPPER EAGLE REGIONAL WATER AUTHORITY;
22. UPPER EAGLE VALLEY SANITATION DISTRICT;
23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
24. VAIL ASSOCIATES, INC.; and
25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

---

* * *

3. THE COUNTY WAS PRE-EMPTED BY FEDERAL LAW FROM DENYING THE REQUESTED PERMITS.

The Sierra Club has provided this Court with an interesting and sometimes informative treatise on the general law of federal pre-emption. However, when it comes to the application of the doctrine to the particular facts of this case, Sierra Club's analysis falls far short of the mark. Sierra Club's argument begins with the premise that the Supreme Court was wrong in *California Coastal Commission v. Granite Rock,* 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1988), when it assumed that the National Forest Management Act (NFMA) and the Federal Land Policy Management Act (FLPMA) pre-empted local land use regulation. Sierra Club then shifts the focus of its argument in an attempt to "hedge its bets," by asserting that even if there be federal pre-emption of local land use controls in this instance, the denial herein was "on *overwhelmingly* environmental grounds". (Sierra Club, p.

18.)[10] As to the former argument, no cogent explanation is set forth relative to why the assumption by the Supreme Court was in error, and as to the latter, one can only take it as an admission that the County's decision was "a little bit illegal".

In support of its position, Sierra Club cites numerous provisions of federal law and accompanying regulations, all of which fall into two categories – those which generally condone some kind of concurrent state regulation under the appropriate circumstances, and those which simply call for federal, state and local cooperation and coordination in the planning process. None of the citations allow the *local denial* of a federally-authorized activity on federal lands as occurred in this instance. By way of example, Sierra Club references §505 of FLPMA which states in part that rights of way require compliance with "*state* standards for public health and safety, environmental protection, . . . if those standards are more stringent than applicable federal standards". However, the Ninth Circuit held in *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981), that "state" standards do *not* include "local" requirements, a position cited with approval by the Tenth Circuit in reviewing the very regulations now before this Court.

> In *Columbia Basin*, the BLM issued a permit to the Bonneville Power Administration (BPA) for a power line right of way. The permit was issued under FLPMA and subject to 43 U.S.C. §1765, the section of FLPMA which Grand

---

[10] On page 4 of its Brief, Sierra Club represents the applicable criteria as "predominantly" environmental.

> County sought to invoke here. As set out above, that section mandates that the right of way contained conditions requiring compliance with "state standards" concerning rights of way, if the standards are more stringent than the federal ones. 43 U.S.C. §1765, *supra*. Citing that section, Franklin County sought to require the BPA to comply with its comprehensive land use plan. In particular, the county noted that Washington state law required the county to develop such a plan. The Ninth Circuit refused to read "state standards" as including local requirements:
>
> > If Congress had meant to include local plans such as that of Franklin County, they could have easily worded the statute to reflect that intent. We therefore hold that the BPA is not required to comply with the terms of the Franklin County Comprehensive Plan.
>
> *Columbia Basin, supra,* at 606.

City and County of Denver v. Bergland, 695 F.2d 465, 485 (10th Cir. 1982). In accord: *Citizens for a Better Henderson v. Hodel,* 768 F.2d 1051 (9th Cir. 1985) ("This court has supported the right of the federal government to exercise such authority [authorization of private activities on federal lands], whether the authorized party is public or private, free of any regulatory interference by local agencies.") Similarly, in *California Coastal Commission v. Granite Rock, supra,* as quoted by Sierra Club, it was "coincident compliance with state law," 94 L.Ed.2d at 593, which was in question, *not* "local" regulation.[11]

---

[11] It cannot be emphasized too often that the *Granite Rock* decision did not involve the veto of a requested state permit. In

Representative of Sierra Club's citations to the code of federal regulations is the lengthy series of references to 36 C.F.R. Part 219 (Sierra Club, p. 10), which citations Sierra Club asserts establish that "NFMA contemplates concurrent state and local regulation." (Sierra Club, p. 10.) However, if one simply reviews Part 219 in its entirety, it becomes apparent that what is involved is a process for "developing and adopting" resource management plans for national forest system lands. 36 C.F.R. §219.1. A "public participation" process is established, 36 C.F.R. §219.6, and if there is local dissatisfaction with the plan, an "appeal process" is available. 36 C.F.R. §219.10. *See also*: 16 U.S.C. §1612. Sierra Club would now have this Court believe that this regulatory scheme somehow acknowledges local regulatory authority, when in fact it merely establishes a framework for cooperation and consideration of such local concerns in the development of the federal plan, and perhaps more importantly, an appeal mechanism if it is decided that such concerns are not being adequately met by the federal agency. No such appeal of the local plan was filed by Eagle County in this instance, and it cannot now use its alleged H.B. 1041 powers to override the federal determinations.

Indicative of Sierra Club's reading of the federal permit conditions governing the federal/state/local

---

fact, plaintiffs therein argued that "there is no reason to find that the [Coastal Commission] will apply the CCA's regulations so as to deprive [Granite Rock] of its rights under the Mining Act." 94 L.Ed.2d at 595. Just such deprivation has occurred in this instance.

interrelationship surrounding this particular project is its statement on pages 8-9 of its Brief:

> Exhibit 1 to the Record of Decision, "Cooperating Agencies and Permits Required," specifically lists "[p]ermits pursuant to Eagle County's and other Counties HB-1041 process" as permits required for the Cities' project to go forward. Record of Decision, Exhibit 1, Page 2.

If one did not take the time to read the permit, one could conclude from this misleading citation that the Forest Service actually made an affirmative finding that a 1041 permit would be required before the Cities could proceed with construction of the project. However, this section of the permit actually states:

> Eagle County and other Counties advise the Forest Service that various permits are needed. These permits would include:
>
> . . .
>
> 2. Permits pursuant to Eagle County's or other Counties HB-1041 process.

Thus, the Forest Service was indicating nothing further than that it had been "advised" by the County that the County felt a 1041 permit was necessary. This certainly falls far short of a federal requirement that such a local permit be obtained.

In addition, when addressing Sierra Club's citation to the permit conditions, it is imperative to note the Court's

analysis in *Brubaker v. Board of County Commissioners*, 652 P.2d 1050, 1057 (Colo. 1982), wherein it was held:

> The trial court also concluded that *Ventura County* was distinguishable because, in the present case, the appellants federally approved operating plan provided an explicit basis for local jurisdiction in stating that "[t]he operator, while conducting operations authorized by this Operating Plan, shall comply with the regulations of the U.S. Department of Agriculture and all federal, state, county and municipal laws, ordinances, or regulations applicable to the area or operations covered by this plan." We find this distinction unpersuasive. *First, the provision only allows for the operation of "applicable" state and local regulations. Since the state law is not applicable if it is pre-empted, the scope of the provision is dependent upon, rather than determinative of, the proper resolution of the pre-emption issue.* Second, even if this provision were construed as an attempt to preserve state and local laws that otherwise would be pre-empted, such a savings clause would be void as beyond the power of the Forest Service Ranger issuing the permit. (Emphasis added.)

Thus, any reference to local requirements in the instant federal permits does not answer the federal pre-emption question.

Finally, though the Sierra Club makes a valiant attempt to characterize all of the County conditions as "environmental" in nature, such is simply not the case. For example, the Board found:

> 4. (6.04.15.1.o) There will be a significant deterioration in public outdoor recreational

areas because of loss in the quality and quantity of the river rafting experience and construction disturbances in the Wilderness Area. (Appendix F, p. 4.)

6. (6.04.16.1.p) Reduction in stream flows and construction activities in the Wilderness Area will result in a significant degradation of natural scenic characteristics. (Appendix F, p. 5.)

10. (6.04.15.1.l) The benefits of the proposed development do not outweigh the losses of natural resources. (Appendix F, p. 5.)

11. (6.04.15.1.c) There will be an adverse effect on the water rights because water quality is a protected element of a water right, and there will be a reduction in downstream water quality. (Appendix F, p. 5.)

15. (6.04.15.1.p) The proposed development will cause nuisance factors such as increased traffic, dust, fire hazards, and dangers from hazardous chemical contamination, explosives and fuels. The mitigation measures proposed by the Cities fail to adequately satisfy this criteria. (Appendix F, p. 5.)

20. (6.04.15.1.k) There may be easements required for tunnels through mining claims. (Appendix F, p. 6.)

1. (2.09.02.13.f) There will be an adverse effect to private property owners. (Appendix F, p. 8.)

1. (2.09.04.1.a) The Project is not compatible with other existing uses. (Appendix F, p. 9.)

2. (2.09.04.1.b) For purposes of this Application, the "neighborhood" is the Wilderness

> Area and adjacent lands. As such, there will be an overall negative effect on the character of the neighborhood. (Appendix F, p. 9.)
>
> 2. [Certificate of Designation] The disposal site is not compatible with surrounding property. (Appendix F, p. 9.)

The "quality and quantity of the river rafting experience" is a land use decision, i.e. will the County have water diversions or aquatic playgrounds? Similarly, regulation of the area as a "wilderness" under Finding No. 6 on page 5 of Appendix F is a land use choice, with construction activities deemed inconsistent with that land use determination. Though water quality can be categorized as an environmental concern, water rights are an individual property interest in Colorado, and their protection is thus more akin to land use control. In fact, even the "nuisance factors" referenced in Finding No. 15 on page 5 of Appendix F have been historically characterized as matters within the ambit of the local "zoning" authority. *Robinson Company v. Luthi*, 115 Colo. 106, 111, 169 P.2d 171 (1946); *C & M Sand and Gravel v. Board of County Commissioners*, 673 P.2d 1013, 1017 (Colo.App. 1983).

On a similar note, Finding No. 1 under §2.09.02.13, which references adverse effects on private property owners, and Finding No. 1 under §2.09.04, which indicates incompatibility with other existing uses, are clearly land use controls, as is finding No. 2 under the Certificate of Designation Application criteria, i.e. the disposal site is not compatible with surrounding property. Thus, even assuming for purposes of argument that the County regulations are not totally pre-empted, even though its decision was an outright denial and its imposition of

environmental regulations was overly severe, it must be acknowledged that the County has attempted to impose land use controls upon the property despite the pre-emptive impact of the provisions of the NFMA and the FLPMA.

* * *